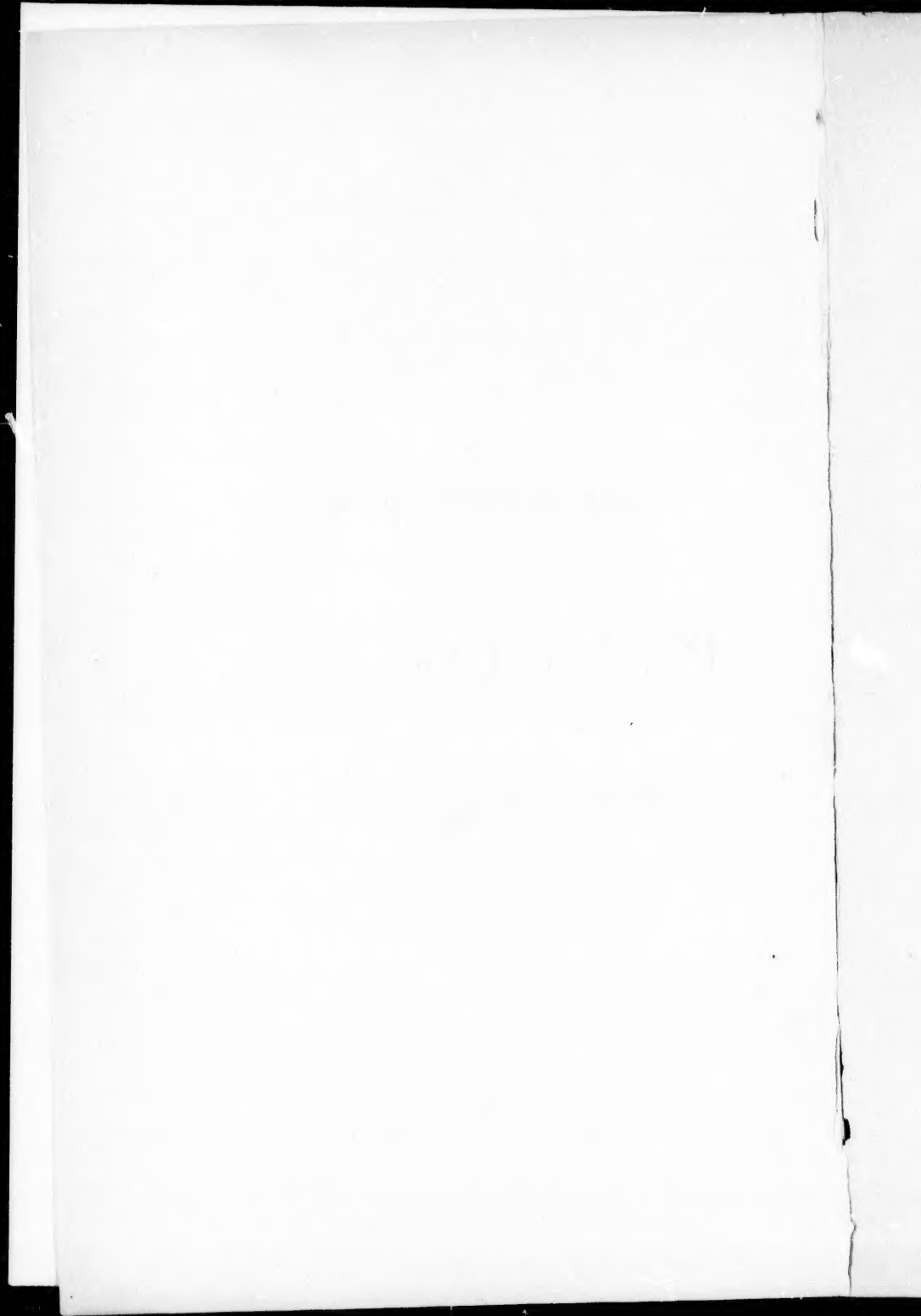


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THE JURISPRUDENCE
OF THE
PRIVY COUNCIL



THE JURISPRUDENCE
OF THE
PRIVY COUNCIL

CONTAINING

A DIGEST OF ALL THE DECISIONS OF THE PRIVY COUNCIL; A SKETCH
OF ITS HISTORY; NOTES ON THE CONSTITUTION OF THE JUDICIAL
COMMITTEE; A SUMMARY OF ITS PROCEDURE

AND ALSO

THREE APPENDICES

BY

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PREFACE

The highest court of appeal for the British colonies is the "Judicial Committee of Her Majesty's Privy Council," commonly called the "Privy Council". This supreme tribunal is composed of the Queen and of a certain number of judges, whose duty is to hear cases submitted to them, and to advise Her Majesty as to the decision which she should give according to law and equity. Although the Queen is never present at the hearing, or at the rendering of judgments, she is considered, by a fiction of the law, as present and presiding over the court, and the Lords, sitting as judges, are only Her advisers. Therefore, when their Lordships deliver judgments, they merely state their reasons, concluding that the Queen should allow or refuse the appeal. The text of the judgment is published afterwards by a special ordinance of Her Majesty.

The appeal to the Privy Council is either *de plano* or by special leave. The first is regulated by colonial statutes or by special charters to courts of Justice. The application is made to the court appealed from, which is called upon to decide whether the cause is within the appealable value or is an appealable grievance. In such case, the application is granted as a matter of course. Special leave to appeal is entirely in the discretion of the Judicial Committee. The Queen as the "Fountain of Justice" may hear, by Her Privy Council, an appeal from any judgment of the colonial courts or judges, although not appealable under the law. This is one of the most ancient and precious of the prerogatives of the Crown.

This legal jurisdiction over the colonies, gives to the Privy Council great powers and influence over our persons, property and institutions, inasmuch as its decisions are naturally the standard of the jurisprudence of the lower courts, and determine the rules for the application of the civil, criminal and other branches of the law.

This should be sufficient to induce every one, especially the members of the legal profession, to become acquainted with the jurisprudence and practice of this tribunal. But without a digest, it must be admitted, this study presents great difficulties. How can a particular case or a special subject be found, without great loss of time, when the decisions are scattered over a great number of volumes? and yet no special digest has ever been made for the Privy Council. It is to meet this much felt want that this book is offered. The form adopted is an improvement on ordinary digests, inasmuch as it gives more than the usual head notes. It is made in alphabetical order, and contains all the decisions of the Privy Council, omitting only the ecclesiastical cases and those of a very local and private character. With the decisions, the date of judgments are given, references are made to the full report and to the names of the courts appealed from; the remarks of their Lordships referring to the principles of law which govern the cases heard are also reported.

The introduction to the book is a sketch of the history of the Privy Council, and may be found interesting as showing briefly how it became an English institution and a court of justice.

The Judicial Committee was created in 1833, by 3rd and 4th William IV. Since that time, this statute has been so amended as to render our notes on it very useful to the understanding of its present constitution and jurisdiction.

The procedure in appeals to the Judicial Committee is very simple. It is contained in a summary showing how an appeal is taken and brought to a hearing, and comprising the rules of practice published by their Lordships.

We have annexed to this book three appendices. The first contains the names of all the British colonies with the indication of the nature and origin of their civil laws. This table is useful as showing the value to be attached to a decision in any particular case; as the principles laid down in an appeal from one colony may be applicable in another appeal from another colony according to the parity of their laws. The second contains notes of all the decisions of the court of Queen's Bench (appeal side), for the Province of Quebec, rendered under the articles of the Code of Civil Procedure on appeals to the Privy Council. They are of great importance, and we may add final, as the Judicial Committee has declared the court appealed from to be the sole authority to decide questions of procedure, such as the giving of security in appeal, preliminary to the introduction of the appeal into the Registrar's office, in England. The

third is a double alphabetical table of the cases reported in this volume.

This work, therefore, is submitted in the hope that it will prove useful to the legal profession, in the arduous task of searching for precedents and authorities. If it serves this purpose, it will have attained the desired end, and the author will have accomplished his object.

Montreal, 1st May, 1891.

J. J. BEAUCHAMP.



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EXPLANATION OF THE ABBREVIATIONS

ABBREVIATIONS.	REPORTERS AND REPORTS.	COURTS.
A. & E.	Adolphus & Ellis	Queen's Bench.
App. Cas.	Appeal Cases	" "
Atk.	Atkyn's Reports	Chancery.
B. or Bar. & Ald. or A.	Barnewall & Alderson	King's Bench.
Bar. & Ad.	Barnewall & Adolphus	" "
B. & Barn. & C. or Cr.	Barnewall & Cresswell	" "
Bea. or Beav.	Benven.	Rolls.
Bell's Cr.	Bell's Criminal Cases	Criminal Appeals.
Bing.	Bingham	Common Pleas.
Bing. N. C.	Bingham, new cases	" "
B. or Bos. & Pul. or P.	Bosanquet & Puller	" "
B. or Br. & L.	Browning & Lushington	Admiralty.
Bro. P. C.	Brown's Parliament Cases	House of Lords.
Brod. & Bing	Broderip & Bingham	Common Pleas.
B. & S.	Best & Smith	Queen's Bench.
Camp.	Campbell	<i>Nisi prius.</i>
C. B.	Common Bench Reports, old series	Common Pleas.
C. B. N. S.	" " new "	" "
C. C.	Consular Court	Province of Quebec.
C. C. P. Q.	Code Civil	" "
C. C. P. P. Q.	Code of Civil Procedure	" "
Ch. App.	Chancery Appeals	Chancery.
Ch. D.	Chancery Division	" "
C. or Car. & K.	Carrington & Kirman	<i>Nisi prius.</i>
C. or Cl. & F. or Fin.	Clark & Finnelly	House of Lords.
C. & P.	Carrington & Payne	<i>Nisi prius.</i>
C. S. U. C.	Consolidated Statutes, Upper Canada.	" "
Cox C. C.	Cox's Criminal Cases	Criminal Appeals.
Cr. & P. or Ph.	Craig & Philip.	Chancery.
Curt. Ecc. Rep.	Curtis Ecclesiastical Reports	Ecclesiastical.
D. or Dears. & B. O. C.	Dearsley & Bell's Crown Cases	Criminal Appeals.
Deac.	Deacon	Bankruptcy.
Dears. or Dears. C. C.	Dearsley's Crown Cases	Criminal Appeals.
De G. J. & S.	De Gex, Jones & Smith	" "
Den. C. C.	Denison	Exchequer & Criminal.
D. & M.	Davison & Merivale	Queen's Bench.
D. or De G. F. & J.	De Gex, Fisher & Jones	Lord Chanc. & Appeal.
Dod.	Dodson, Admiralty Cases	Admiralty.
Drew.	Drewry	Kindersley V. C.
D. or Dr. & War.	Drury & Warren	Chancery, Ireland.
East.	East	King's Bench.
E. or El. B. or Bl.	Ellis & Blackburn	Queen's Bench.
Edw. A. R.	Edward's Admiralty Reports	Admiralty.
E. or El. & E. or El.	Ellis & Ellis	Queen's Bench.
E. or Eng. & Ir. App.	English and Irish Appeals	House of Lords.
Ex. Rep.	Exchequer Reports	Exchequer.
Exch. (W., H. & G.)	{ Exchequer Reports by Welsley, Hurlstone & Gordon.	" "

Hagg. Adm.....	Haggard's Admiralty Reports.....	Admiralty.
Hagg. Ecc. Rep.....	Haggard's Ecclesiastical Reports.....	Ecclesiastical.
Hare.....	Hare.....	Vice-Chancellor.
H. & C.	Hurlstone & Colman.....	Exchequer.
H. L.	House of Lords.....	
H. L. C.....	House of Lords Cases (Clark).....	House of Lords.
H. or Hem. & M. or Mil.....	Hemming & Miller.....	Chancery.
H. & N.	Hurlstone & Norman.....	Exchequer.
How. R. U. S.	Howard's Reports, United States.....	Supreme Court.
Ins.....	Institutes.....	
Ir L. Rep. (Eq.).....	Ireland Law & Equity Reports.....	Common Pleas.
J. or Jac. & W. or Wal.....	Jacob & Walker.....	Chancery.
Jurist.....	Jurist.....	General.
J. or Jebb & S.....	Jebb & Syme's Reports.....	King's Bench, Ireland,
K. or Kay & J.....	Kay & Johnson's Reports.....	Chancery.
Knapp.....	Knapp's Privy Council Reports..	Privy Council.
L. C. J.	Lower Canada Jurist.....	General.
L. C. L. J.....	Lower Canada Law Journal.....	"
L. C. R.....	Lower Canada Reports.....	"
Leon.....	Leonard's Reports.....	King's Bench.
L. J. Ex.....	Law Journal.....	Exchequer.
L. J. P. C.....	Law Journal Privy Council.....	Judicial Committee.
L. N.....	Legal News (Canada).....	General.
L. R. App. Cas.....	Law Reports, Appeal Cases.....	House of Lords Privy Council.
L. R. H. L.	" " " ".....	House of Lords.
L. R. P. C.....	" " " ".....	Privy Council.
L. R. S. C.....	" " " ".....	Superior Court.
L. R. Q. B.....	" " " ".....	Queen's Bench.
L. T. N. S.....	Law Times, new series.....	General.
M. or Mau. & S. or Sel.....	Maule & Selwyn.....	King's Bench.
M. or Mont. D. & D. } or De G.....	Montague, Deacon & De Gex's Rep.....	Bankruptcy.
Macq. Sc. Ap. Cas.....	Macqueen's Scotch Appeals Cases.....	House of Lords.
Mer. or Meriv.....	Merivale's Reports.....	Chancery.
M. L. R.....	Montreal Law Report.....	General.
Moore.....	Moore's Privy Council Reports.....	Judicial Committee.
Moore Ind. App.....	Moore's Indian Appeal Cases.....	" "
M. or Mee. & W. or Wels.....	Meeson & Welsley.....	Exchequer.
Myl. & C.....	Myline & Craig.....	Chancery.
My. & K.....	Myline & Kren.....	"
Noy.....	Noy's Reports.....	King's Bench.
N. S.....	New Series.....	
O. C.....	Order in Council.....	
P. D.....	Perry & Davison.....	Queen's Bench.
Ph. or Phil.....	Philip.....	Chancery.
P. Wm.....	Peere Williams.....	"
Q. B.....	Adolphus & Ellis Reports, new series.....	Queen's Bench.
Q. L. R.....	Quebec Law Reports.....	General.
Reg.....	Regina.....	
R. L.....	Revue Légale (Quebec).....	"
Rob.....	Robinson.....	House of Lords.
Robert. App.....	Robertson's Appeals.....	"
Russ.....	Russell.....	Chancery.
Russ. & M. or Myl.....	Russell & Mylne's Reports.....	"
R. or Ry. & M. or Mood.....	Ryan & Moody.....	Nisi prius.
Salk.....	Salkeld's Reports.....	King's Bench.

S. C. R.....	Supreme Court Report (Canada)	Supreme Court.
S. C.....	Supreme Court	
Sim.....	Simon	Vice-Chancellor.
Sup. C.....	Superior Court	
Sw. & Tr.....	Swabey & Tristram's Reports.....	Probate & Divorce.
Swa.....	Swanston	Chancery.
Swab.....	Swabey Reports	Admiralty.
Taunt.....	Taunton.....	Common Pleas.
T. or Term. R. or Rep...	Terms Reports (Durnsford & East)....	King's Bench,
U. C. R.....	Upper Canada Reports.....	General.
V.....	Versus	
V. A.....	Vice-Admiralty	
Ves.....	Vesey.....	Chancery.
Ves. jr.....	Vesey, junior.....	"
W. B. L. or W. Bl.....	Sir William Blackstone.....	Common Pleas & Q. B.
Wheaton	Wheaton's American Reports.....	
Wm. Rob.....	William Robinson's New Admiralty Reports.	

INTRODUCTION

SKETCH

OF THE

HISTORY OF THE PRIVY COUNCIL

ORIGIN OF THE PRIVY COUNCIL

The Privy Council, like all institutions which have a political origin, has a history full of troubles and conflicts. A few of its pages are stained with deeds of injustice and violence, but these belong to a time when England, demoralized and weakened by party struggles, had to submit to the despotism of men who could not curb their passions. But it has generally been composed of the most noble and distinguished lords of the realm. A great number of them have acquired celebrity by their virtues and have been renowned as much for their science and their love of justice, as for their descent and wealth.

From its origin, the Privy Council has been so bound up with the constitutional laws of Great Britain, that it is impossible to relate the history of the one, without narrating that of the other.

England has always retained the same form of government. She has been ruled with more or less despotism, with more or less liberty, according to time and sovereign, but there have always been the king and the upper and lower houses forming a Parliament. During the later centuries, as far back as the revolution of 1688, great changes have

been introduced by the constitutional doctrine. Nevertheless the bases of authority and sovereignty have remained the same. Those modifications, however important they may be, were not radical; on the contrary, they were only the logical developments of the political institutions introduced by the old laws of Great Britain. The abuses of the monarchs, the intellectual emancipation of the people, the modifications in manners and customs, the new aspirations of the day, have all necessarily brought about a division of the legislative, administrative and judiciary powers, which had for a long time been entirely vested in the sovereign. The constitutional doctrine has been in the political genius of the English nation since the time of their earliest ancestors; the revolution of 1688 having been the last blow to the hydra of English despotism and arbitrary government, just as that of 1215, with its *Magna Charta*, was the first.

Before the conquest, the Anglo-Saxons were governed by the king with the assistance of a great national Assembly called "Wittena Gemote".¹

That assembly had greater powers than parliament at present possesses, for it had the right to dethrone the king and appoint a substitute in exceptional circumstances. It also had the right to decide on peace and war, which now belongs exclusively to the king or queen in council. On the other hand, it appears to have been less blustering and more submissive, because the king might, and often did ignore its advice, set aside its vote, and proceed according to his own will, without fear of a revolution.

After the conquest, the Normans introduced into Great Britain the principles of their government with all its prerogatives and despotism. The history of England shows that they laid upon the people a yoke of iron. The Anglo-Saxons, on their side, fought with great energy to preserve their democratic principles and their spirit of liberty. The history

¹ Anglo-Saxon word which mean "Assembly of wise men"; it was also called "Michel Symoth" or "Great Council"; or "Michel Gemote" or "Great Meeting". Blackstone * 47.

of their parliaments is, in consequence, a continual alternation of weak and vigorous actions which appear all the stranger to us, as in our own times the rights and obligations of each element of power are well and simply defined.

The government, under the Normans, was composed of the king and two great councils: the *Magnum Concilium*, today the House of Lords, and the *Commune Concilium*, now the House of Commons. This last council was very seldom consulted, except in the beginning, in matters of finance, and later on, in matters of commerce, industry and agriculture. Its foundation was due to the continuous conflicts between Henry III and the aristocracy. The majority of the noblemen, who formed part of the *Magnum Concilium*, in 1258, called upon all the commons and towns of the realm, to send representatives to parliament, to support them in extending and confirming the Provisions of Oxford. The statute was obtained, and, when once peace had been restored, the Great Council ordered the dismissal of the people's representatives. The latter resisted, and after numerous efforts, difficulties and conferences they were allowed to form the *Commune Concilium* to serve as an intermediary between the *Magnum Concilium* and the people, just as this last council was a link between the king and the people. The influence of this council, however, was at that time nearly null; it had only the right to submit its views, and was a consulting body only.

The most important of these councils, the only one which had any authority, was the Great Council. This was composed of the members of the nobility who were summoned by the king at irregular and undetermined intervals according to necessity. The number was also undetermined, and there was no official nomination. The king called in, for each meeting, whomsoever he pleased; generally the more wealthy and powerful among the nobles. And when a lord had once been summoned to the Great Council, it was understood that he should be summoned again during life.

This Assembly was entrusted with the administration of the kingdom, and decided upon war, peace and treaties

with other nations; but its character was not absolutely legislative, because the king could reject its laws, and even substitute therefor his own ordinances. It is true that the exercise of such a power was surrounded with dangers which varied in degree according to time, to the mind of the people and to the popularity of the king, but the delimitation of powers was so little understood, that there was practically no limit to that of the king.

The characteristic element of the *Magnum Concilium* was its judiciary functions. It was its principal attribution, and what gave it an independent existence. Its jurisdiction covered civil and criminal matters, and extended over all inferior tribunals, over the people, the nobility, and over the king himself. It was a sovereign court to which the subjects could bring their complaints, even in first instance, to be finally adjudged. It is true that in judiciary matters, as in political, the will of the king was generally law, but there were great examples of independence, honour and dignity. Thus, *Macqueen* speaks of king Edward I who appeared before the Great Council in a civil suit, lost his case and was condemned.

Among the members of this House were the great officers of the king, the general officers of the army, the first judges of the court, and certain ecclesiastical dignitaries, predecessors of the spiritual Lords of our days. It naturally happened that the king did not call them together each time he wanted advice. The sovereign then would in an informal manner consult some of them according to their special learning. If he desired advice on matters regarding the army, he would call those who had experience in war; if it was with regard to a lawsuit, he would consult the judges. This became more and more necessary as the number of the Great Council was all along increasing in order to keep pace with the extension of the realm, both in England and in the colonies. From this custom sprang the right of the crown to consult privately certain members of the Great Council, who, in consequence, took a larger part in the administration of the realm. They came to form

what was called the *Curia Regis*,¹ and became the great officers of the crown, the special advisers of the king. They have greatly contributed to enlarge his influence, to increase his revenues and to guard his prerogatives.

This was the origin of the Privy Council.

THE PRIVY COUNCIL UP TO THE CONSTITUTION OF THE
"JUDICIAL COMMITTEE."

It is impossible to give the exact date of the formation of this council. As we have seen above, it arose from political circumstances, and was in existence *de facto*, long before it was recognized as an English institution. The executive power being concentrated in the hands of the king, it was necessary that officers should be appointed to relieve the king from his numerous duties. Even before the existence of the *Curia Regis* the king had his great officers, but they then acted individually without any deliberation among themselves. This state of things, the irresponsibility of these officers, and moreover, the independence of the king towards parliament, rendered more necessary the existence of a Privy Council.

In the history of nations, there never existed a sovereign who could govern entirely alone. Even the great tyrants, the most absolute despots, have been forced to abandon part of their authority to favorites. In England, the sovereign has never been entirely absolute. Under the Tudors, the most autocratic of its princes, the independence of the people, the love of liberty were so strong, that the king was always forced to take the advice of his ministers for each important decision. And as a logical consequence of this principle, every arbitrary or unjust act of the king was thrown on the responsibility of his ministers. The sovereign being inviolable, another person had to put himself in his stead so as to be within the reach of the people. This responsibility

¹ These words have been retained in our legal practice. When cases are taken under advisement by our courts, the letters C. A. V., that is: *Curia advisere vult*, are written on the record; and the judgments are generally rendered: *Per curiam*.

has often been a nullity; but sometimes it has asserted itself strongly enough to force the king to disgrace his favorites, to banish them, and even to condemn them to death. We find such examples in the history of England.

Under Edward I, the law suits or judicial work brought before the Great Council became so numerous, and at the same time, the number of the lords was so great, that it became necessary to provide for a better mode of administering justice. To reach that end, the House of Lords (this name was given to the Great Council) named some *Receveurs* and some *Trieurs des Petitions*. These high functionaries were specially chosen to receive and decide all petitions of a judiciary character that might be presented to the House, *de manière que le roi et les lords puissent avoir des loisirs pour s'occuper des affaires plus importantes de l'Etat*.¹

There was an appeal from the judgments of the court of *Receveurs* and *Trieurs*, but this appeal was very seldom resorted to; because when the case was of great importance, it was referred to the House of Lords; or if the case belonged to another tribunal, it was sent to its proper court.

These judges were commissioned by Parliament, but were named by the crown. They were always members of the Privy Council. Thus, by naming, as a rule, members of his council, the king concentrated nearly all the legal jurisdiction of the parliament in the hands of his private councillors, thereby greatly increasing their influence.

There were *Receveurs* and *Trieurs des Petitions d'Angleterre Gales et Escocce*; there were others for *Gascoigne, Aquitaine Guernsey et des autres Terres et Pays de par delà la Mer et les Isles*. It was the first time that a distinct jurisdiction was made for the kingdom and the colonies or plantations. This institution was named the "High Court of Parliament," and was long in existence. On the 20th of November 1837, Queen Victoria, according to this custom named twenty-six *Trieurs* for Great Britain and Ireland, and twenty-four for the colonies, besides three *Receveurs* for each court, with the

1 33 Edward I.

following order in council : *Et ceux qui veulent délivrer leur petitions les baillent dedans six jours prochainement ensuivant.*

*Touts eux ensemble ou quatre des Seigneurs avant ditz appellant aux eux les Sergeants de la Reine quant sera besoigne tiendront leur Place en la Chambre de Tresorier.*¹

The Privy Council thus appears to have acquired a wide jurisdiction, but its powers were only delegated, the authority remaining *de jure* in the House of Lords. And the *Receveurs* and *Trieurs*, although private councillors, not only were, as a court of justice, distinct from the Privy Council, but the latter body itself was, with the king, part of the Parliament.

How did the Privy Council acquire a separate existence, and how did it obtain a distinct legal jurisdiction ?

The principle which had first created the necessity for its formation, brought about its independence. This event is explained by the political circumstances of the time.

It is well known that, under the Tudors, the kings attempted, as a general rule, to govern the nation without the cooperation of Parliament. To that end, they increased as much as they could the powers of their Privy Council, which served them with submission and was the instrument of their will. English authors have defined the privy council as "the confidential servant of the crown." If it has ever justified the literal sense of this definition, it is during that period of English history.

It was under Henry VII that the "Star Chamber," which was only a committee of the Privy Council, was created. Its powers were unlimited, its procedure arbitrary, and its judgments coloured by the political passions which then divided the country. The judges of the Star Chamber dealt with all civil and criminal cases submitted to them by the king, by parliament or by private persons, but especially with political offences. The accused party could not be defended, he could rarely call his own witnesses, and the judgment

¹ Macqueen's House of Lords, p. 11.

was without appeal. This court was a terrible instrument in the hands of Henry VIII and Queen Elizabeth.

During these two last mentioned reigns, Parliament sat on very few occasions, and was finally banished, the sovereign then governing with his privy council. These circumstances brought about a complete separation between Parliament and the Privy Council. What had previously been done by this body as auxiliary to Parliament, was then done by its own authority with the sanction of the Crown. This change took place without commotion, as the judges remained the same, the *Receveurs* and *Trieurs*, as above stated, having always been nominated from amongst the privy councillors. Moreover, the Privy Council, being intimately bound to the Crown in its struggles with Parliament, had become the enemy of this last body, and all endeavours were directed towards its complete and absolute separation from Parliament.

However, this court of justice, in consequence of its constant connection with political quarrels and its subserviency to the wishes of the Crown, soon fell into disrepute among the people, who looked upon the "Star Chamber" as one of their most formidable tyrants.

Queen Elizabeth, pressed by the popular voice which had become threatening, frightened by the renewed agitation of Parliament, established, in Parliament, a Court of Exchequer, to hear appeals from the law courts of Westminster.¹ The preamble of this statute, to justify the creation of this new tribunal, declares that these appeals were within the jurisdiction of the High Court of Parliament. Thus the House of Lords was vindicating its rights and privileges, with the consent of the Queen and Commons. But the appeals from the colonies were retained by the Privy Council, with other jurisdiction connected with the prerogatives of the Crown.

The division of jurisdiction between England and her colonies had first been introduced by the House of Lords by

¹ 27 Elizabeth, ch. 8.

the nomination of distinct *Receveurs* and *Trieurs*, as we have seen above, and was thus finally settled by the establishment of the court of Exchequer which took all the appeals of Great Britain, leaving to the Privy Council those from the plantations. The inhabitants of the colonies, says *Macqueen*, having no representatives in Parliament, it was immaterial to them whether their appeals should depend on the decision of one or the other of these tribunals.

In 1640, under Charles II, to complete the people's victory against the royal prerogatives, the statute 16 Chs. I, ch. 10, which abolished the "Star Chamber," was passed. The same statute authorized the use of the Writ of *Habeas Corpus* to put an end to arbitrary imprisonment, and to give to those unjustly deprived of their liberty a means of recovering it summarily.

At last came the revolution of 1688, and with the Prince of Orange commenced the real constitutional period. The delimitation of powers, the jurisdiction of each branch of Parliament, became more apparent and consolidated itself. Parliament, firmly reorganized, put into full operation the institution of trial by jury which had been obtained by the *Magna Charta* in 1215, but had been practically set aside by the high functionaries.

Since that time, the Privy Council has had full executive powers. The administration of the United Kingdom has remained in the hands of the king acting through responsible ministers, members of the Privy Council, who are called the "Cabinet" or "Ministry." A tolerably wide legal jurisdiction has also remained with the Privy Council, both original and appellate. This will be explained further on in our notes of its constitution. The Privy Council, according to Sir Edward Coke's description, has remained ever since "a noble, honourable and reverend assembly of "the king, and such as he wills to be of his privy council, "in the King's court or palace."

The number of the private councillors was originally twelve, but being left to the pleasure of the king, it increased rapidly. Charles II, in 1679, limited the number to thirty ;

half of whom were to be the fifteen principal officers of the kingdom, and were councillors *ex virtute officii*; the remaining fifteen were chosen by the Crown, ten in the House of Lords, and five from the commoners. Since then, the number has been considerably increased, and is now undetermined. But this is no cause of inconvenience, because the Queen calls only upon certain of them to advise Her, that is her Cabinet ministers. The nomination belongs to the sovereign, and confers the title of "Right Honourable" during life.

The duties of a private councillor are described as follows by *Blackstone*, and appear also from the oath of office:—
" 1. To advise the king (or queen) according to the best of his cunning and discretion. 2. To advise for the king's (or queen's) honour and good of the public, without partiality through affection, love, meed, doubt or dread. 3. To keep the king's (or queen's) counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution of what shall be resolved. 6. To withstand all persons who would attempt the contrary. And lastly, in general, 7. To observe, keep, and do, all that a good and true councillor ought to do his sovereign lord."

The Queen may dissolve her council; she may exclude some of its members; she has absolute control over it; but as regards those who form her cabinet, she is subject to the rules of the constitutional doctrine and must follow the will of the majority of the people's representatives.

At the death of the sovereign, the Privy Council is *ipso facto* dissolved, except the paid members of the "Judicial Committee." To obviate such an inconvenience, the statute 6 Ann. ch. 7 provides that the council shall continue to exist six months after the demise of the king, unless sooner dissolved by his successor.

NOTES

ON THE

CONSTITUTION OF THE JUDICIAL COMMITTEE.

What may be called the constitution of the Judicial Committee of the Privy Council is the statute 3 and 4 William IV, chap. 41 : "*An act for the better administration of justice in His Majesty's Privy Council*," passed in 1833. It was made for the better disposal of appeals and other matters in litigation referred or submitted to His Majesty in His Privy Council.

PREAMBLE.¹

The preamble refers to the statutes which have previously given to the Privy Council a jurisdiction over certain matters, as 2 and 3 Will. 4, ch. 92 ; 25 Hen. VIII, ch. 19 ; 8 Eliz. ch. 5. As to colonies, it only recognized that an appeal lies to the Privy Council from the decisions of their courts, without indicating its origin. Other matters than those mentioned in this preamble were within the province of the Privy Council as appertaining to the Royal Prerogatives. They will be mentioned under section III of this act.

The great evil complained of for many years is therein referred to "whereas appeals have usually been heard before a committee of the whole Privy Council..." "it was

¹ The text of the statute is not always given here. These notes are sufficient to make clear what it is and are more explicit. When it is necessary, part of text or sections are cited at length. The object was not to make this work too voluminous ; it is easy, however, to find the text in the statute book.

expedient to make provisions for the more effectual hearing and determining of appeals."

There were most serious objections to having the cases heard before a general committee. Certain members were present at the hearing and could not be at the rendering of the judgment, others only heard part of the argument. They relied on each other, confident in the number and experience of the more distinguished of them. Sir Edward Coke¹ describes the Privy Council at that time not as a court of justice, but as a mere board of deliberation.

SECTION I :—*Composition of the Judicial Committee.*

This first section regulates the composition of the Judicial Committee, as it has been until the "*Judicial Committee Act of 1871.*"²

There is no distinction of rank between the members, but they may be divided into two classes according to their origin. Some become members *ex officio* by their appointment to certain high charges or offices, others are specially commissioned by His Majesty. But no person can be called to form part of the Judicial Committee unless he be a privy councillor.

The members *ex-officio* are: The President of the Privy Council for the time being; the Lord High Chancellor of Great Britain for the time being; and also the Lord Keeper or first Lord Commissioner of the Great Seal; the Lord Chief Justice or Judge of the court of King's Bench; the Master of the Rolls; the Vice-Chancellor of England; the Lord Chief Justice or Judge of the Court of Common Pleas; the Lord Chief Baron of the Court of Exchequer; the Judge of the Prerogative Court of the Lord Archbishop of Canterbury; the Judge of the High Court of Admiralty; the Chief Judge of the Court in Bankruptcy; and also all persons, members of the Privy Council, who shall have been Presidents there-

¹ 4 Inst. 53.

² 34 and 35 Vict. ch. 91.

of, or held the office of Lord Chancellor of Great Britain, or shall have held any of the other offices herein before mentioned.

By 5 Vict. ch. 5, two additional Vice-Chancellors of England have been named, these ministers also, provided they are Privy Councillors, become *ex officio* members of the Judicial Committee.

A proviso at the end of the section gives to His Majesty the power to appoint any other two persons. But it is understood that those persons must be Privy Councillors.

By a subsequent statute 3 & 4 Vict., ch. 86, sect. 15 & 16, the Archbishops and Bishops being members of the Privy Council became members of the Judicial Committee with the right of sitting in all ecclesiastical cases.

This organisation existed until 1871 when it was found necessary to provide for a more regular working of the Judicial Committee. Then the following "*Judicial Committee Act, 1871*"¹ was passed by the English Parliament :

" Her Majesty may within twelve months after the passing of this Act, by warrant under her Sign Manual, appoint four persons qualified as in the Act mentioned, whether already members of such "*Judicial Committee*" or not, to act as members of the "*Judicial Committee*" of the Privy Council under the provisions of this Act, and may from time to time within two years after the passing of this Act by a like warrant fill any vacancies occasioned by death or otherwise in the offices of the persons so appointed. "

This is the first law which makes exception to the general principle, invariably applied, that members only of the Privy Council could be appointed to the Judicial Committee. The act just mentioned allows any person to be called. This innovation shows that the institution had lost part of its political significance while assuming a more decidedly judicial character. The only qualification required by this Act was that the members must at the time of their appoint-

¹ 34 and 35 Vict., ch. 91.

ment be or have been judges of one of Her Majesty's Superior Court at Westminster, or a Chief Justice of the High Court of Judicature at Fort William in Bengal, or Madras or Bombay, or of the late Supreme Court of Judicature at Fort William in Bengal.

Each of these four judges received a salary of £5000 a year including any pension to which they might be entitled. Their duty was to attend the sittings of the Judicial Committee when summoned thereto. They hold their office during good behavior, continue to hold it notwithstanding the demise of the Crown, and are only removable by Her Majesty, upon an address of both Houses of Parliament.

This Act, however, did not affect the Act, 8 and 4 Will. IV, ch. 41, first above mentioned, except in so far as it augmented the number of the judges in the Judicial Committee, and provided for speedier and better despatch of business. These new judges, being paid, had to sit for the hearing of appeals, while before that Act, the judges of the Committee sat voluntarily and without remuneration.

This last statute was only temporary, the power given to Her Majesty being for two years. Parliament had then in view the creation in the near future of a Supreme Court of appellate jurisdiction that might affect the Judicial Committee.

This Supreme Court was created by the *Supreme Court of Judicature Act, 1873*¹ but did not in any way touch the Privy Council. A later Act, the *Appellate Jurisdiction Act, 1876*,² amended the constitution of the Judicial Committee. The sixth section ends thus: "A Lord of Appeal in Ordinary, shall, if a Privy Councillor, be a member of the Judicial Committee of the Privy Council, and, subject to the due performance by a Lord of Appeal in Ordinary of his duties as to the hearing and determining of appeals in the House of Lords, it shall be his duty being a Privy Councillor, to sit and act as a member of the judicial Committee of the Privy Council."

¹ 36 and 37 Vict., c. 66.

² 39 and 40 Vict. c. 59.

And the fourteenth section is, in part, as follows : " Be it enacted, that whenever any two of the paid Judges of the Judicial Committee of the Privy Council have died or resigned, Her Majesty may appoint a third Lord of Appeal in Ordinary, in addition to the Lords of Appeal in Ordinary hereinbefore authorised to be appointed, and on the death or resignation of the remaining two paid Judges of the Judicial Committee of the Privy Council Her Majesty may appoint a fourth Lord of Appeal in Ordinary in addition to the Lords of Appeal in Ordinary aforesaid, and may from time to time fill up any vacancies occurring in the office of such third or fourth Lord of Appeal in Ordinary."

This statute therefore replaced the Judicial Committee as it was constituted by the 3 and 4 William IV, with the exception that two paid Lords in Ordinary of the Court of Appeal were appointed. The same section provides that these two Lords in Ordinary shall have the same salary and hold the offices as the paid Judges heretofore appointed.

In order to know what the term " in ordinary " means, it is necessary to understand the constitution of the Court of Appeals. This Court is composed of Judges *ex officio* and of others specially appointed. The last ones are named " Lords of Appeal in Ordinary."

By the 14th section of this last Act, it was also enacted that " Her Majesty by Order in Council and with the advice of the Judicial Committee, may make rules for the attendance, on the hearing of ecclesiastical cases, of such number of the archbishops and bishops of the Church of England as may be determined by such rules as assessors of the Judicial Committee, for one or more years."

But those rules must be laid before each House of Parliament, which may by an address to Her Majesty require the same to be annulled.

Finally, the constitution of the Judicial Committee has been again amended by 50 and 51 Vict. ch. 70, sect. 3 (1887) which provides that in addition to those who are now members of the Judicial Committee, there shall be included in the

Judges of the said Committee, all those Judges who are now holding or have held any of the offices which the *Appellate Jurisdiction Act of 1876* and this act describe as "high judicial offices." These high Judicial offices are, besides those herein-before named, the Judges of Superior Courts of Great Britain and Ireland which means the High Court of Justice, the Court of Appeal, the Superior Courts at Dublin, the Court of Session in Scotland.

The Lords of Appeal in Ordinary and the paid members of the Judicial Committee are also "high judicial officers."

SECTION II :— *Appeals from Admiralty Courts.*

This section gives jurisdiction to the Judicial Committee over all appeals from the Courts of Admiralty or Vice-Admiralty in the colonies.

We have in the Province of Quebec a court of Vice-Admiralty, sitting at Quebec, with powers very nearly the same as those of the High Court of Admiralty of England. This Court was established in 1764, by a commission of Vice-Admiral given by George the Third, to Governor Murray. The appeals from this Court, as from all the courts in the colonies were formerly vested in the king in Council, but doubts having arisen that this jurisdiction belonged to the High Court of Admiralty, the question was argued in the appeal of *"The Fabius"*, in 1813,¹ and was decided in favor of this last tribunal. After that judgment no appeal has been received by the Privy Council. But this section transfers this jurisdiction to the Judicial Committee, and it was confirmed by the statute 26 Vict., ch. 24 (1863) whose 22nd section is as follows : "The appeal from a decree or order of a Vice-Admiralty Court lies to Her Majesty in Council."

Another statute, the "*Supreme Court of Judicature Act 1873*"² has given the hearing of appeals in admiralty cases to the new Court of Appeal created by this Act. The eighteenth section reads thus :

¹ 2 Rob. 249.

² 36 and 37 Vict. ch. 66, sect. 18, (5).

"The Court of Appeal established by this Act shall be a Superior Court of Record, and there shall be transferred to and vested in such Court all jurisdiction and powers of Court following :

"(5) All jurisdiction vested in or capable of being exercised by Her Majesty in Council, or the Judicial Committee of Her Majesty's Privy Council, upon appeal from any judgment or order of the High Court of Admiralty, or from any order in lunacy made by the Lord Chancellor, or any other person having jurisdiction in lunacy."

But this legislation affected only the Court of Admiralty in England, and not the Vice-Admiralty Courts in the colonies.

A more recent statute passed in 1890, (53 and 54 Vict.) has substituted another organization for the disposal of admiralty cases. The 17th section of this Act enacts that : "On the commencement of this Act in any British possession, but subject to the provisions of this Act, every Vice-Admiralty Court in that possession shall be abolished." The second section of the same act says that : "Every Court of law in a British possession, which is for the time being declared in pursuance to this Act to be a Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the Governor is the sole judicial authority, the expression "Court of law" for the purposes of this section includes such Governor."

This Act is to take effect from the first day of July 1891. Thus, after that date, our Vice-Admiralty Court, at Quebec, will be abolished, and all its jurisdiction will be transferred to the Superior Court.

The 6th section of this statute regulates the appeal of admiralty cases as follows :

“(1) The appeal from a judgment of any court in a British possession in the exercise of the jurisdiction conferred by this Act, either where there is as of right no local appeal or after a decision on local appeal, lies to Her Majesty the Queen in Council.

“(2) Save as may be otherwise specially allowed in a particular case by Her Majesty the Queen in Council, an appeal under this section shall not be allowed—

“(a) from any judgment not having the effect of a definitive judgment unless the court appealed from has given leave for such appeal nor

“(b) from any judgment unless the petition of appeal has been lodged within the time prescribed by rules, or if no time is prescribed within six months from the date of the judgment appealed against, or if leave to appeal has been given then from the date of such leave.

“(3) For the purpose of appeals under this Act, Her Majesty the Queen in Council and the Judicial Committee of the Privy Council shall, subject to rules under this section, have all such powers for making and enforcing judgments, whether interlocutory or final, for punishing contempts, for requiring the payment of money into court, or for any other purpose, as may be necessary, or as were possessed by the High Court of Delegates before the passing of the Act transferring the powers of such court to Her Majesty in Council, or as are for the time being possessed by the High Court in England or by the court appealed from in relation to the like matters as those forming the subject of appeals under this Act.

“(4) All orders of the Queen in Council or of the Judicial Committee of the Privy Council for the purposes aforesaid or otherwise in relation to appeals under this Act shall have full effect throughout Her Majesty's dominions and in all places where Her Majesty has jurisdiction.

“(5) This section shall be in addition to and not in derogation of the authority of Her Majesty in Council or the

"Judicial Committee of the Privy Council arising otherwise than under this Act, and all enactments relating to appeals to Her Majesty in Council or to the powers of Her Majesty in Council or the Judicial Committee of the Privy Council in relation to those appeals, whether for making rules and orders or otherwise shall extend, save as otherwise directed by Her Majesty in Council, to appeals to Her Majesty in Council under this Act."

SECTION III :—*General Jurisdiction.*

This third section transfers to the Judicial Committee, the entire jurisdiction heretofore exercised by the Privy Council. Since then, several statutes have amended this section. We will examine what is at present the jurisdiction of the Committee.

We may divide it into three classes: the *first* is the jurisdiction to hear appeals in certain matters or judgments from Courts either outside or inside of the realm; the *second*, inside; and the *third*, outside; with a certain original jurisdiction in the two latter cases.

1.—There is an appeal to the Judicial Committee in all ecclesiastical cases whether from the Courts of the kingdom, or from the colonies or plantations. Before the Reformation, the last appeal in this matter was to the Pope, at Rome, but after the Church of England had separated from that of Rome, the English Parliament gave this jurisdiction to Henry VIII, as the head of the Reformed Church. In early times the Crown exercised this right by means of a special tribunal appointed for each case, under the name of the "High Court of Delegates." Afterwards, by 2 and 3 William IV ch. 92, this jurisdiction was delegated to the Privy Council, and finally by the above section, it was transferred to the Judicial Committee.

2.—The Jurisdiction of the Judicial Committee within the kingdom is very limited. The "*Supreme Court of Judicature Act, 1873*"¹ has taken away in favor of the

¹ 36 and 37 Vict., ch. 66 Sect. 18.

Court of Appeal its original jurisdiction in matters of lunacy or idiocy. The only appeals that may now be received are those from the decisions of the Court of the Warden of the Stannaries in Cornwall, if there should happen to be no Prince of Wales, to whom in his Council as Duke of Cornwall the appeal properly lies. The Judicial Committee has also an original jurisdiction to grant an extension of Patents.¹

3.—The principal jurisdiction of the Judicial Committee is outside of the kingdom. It exercises original jurisdiction whenever a question arises between two provinces in the colonies or plantations, as concerning the extent of their charters and the like. This is according to the principles of feudal sovereignty. And so likewise when any person claims an island or a province, in the nature of a feudal principality, by grant from the king or his ancestors, the decision belongs on the same principle to the Judicial Committee. But most important is the jurisdiction over all the Courts of law and equity in the colonies. This is an appeal of right, based upon the principle that the king cannot refuse to hear his subjects who have been injured by the judgments of His Courts in the colonies when they appeal to himself for redress. The English Parliament sanctioned this doctrine by enacting:²

“That it shall be competent to Her Majesty by an Order
“or Orders to be from time to time for that purpose made
“with the advice of Her Privy Council, to provide for the
“admission of any appeal or appeals to Her Majesty in
“Council from any judgments, sentences, decrees, or orders
“of any Court of justice within any British colony or pos-
“session abroad, although such court shall not be a Court
“of Error or a Court of Appeal within such Colony or
“Possession.”

Therefore, an appeal from the judgments of all colonial courts lies to the Judicial Committee *de plano* when the causes are within statutes allowing such appeals, if there exist such statutes. A great liberty is left to the Provinces

¹ 5 and 6 William IV ch. 83; 7 and 8 Vict., ch. 69, sect. II.

² 7 and 8 Vict., ch. 69.

to limit the appeals, provided the royal prerogative is not interfered with. The colonial Legislatures are only limited in those powers of legislation by their own constitution, or by the instructions to the Governors. In the Dominion of Canada an unlimited liberty is left to the Legislatures on this subject. They cannot however take away the royal prerogative to grant appeals in all cases, without the express assent of the crown. And the Queen may always grant an appeal as an act of grace in any case.

The last part of this section lays down a well known principle of justice, that the judgment or report to His Majesty and the grounds of the decision must be stated in open court. It is a guarantee to the litigants, but it is more for the public good, for it tends to fix general principles, and to establish uniformity of jurisprudence. This has been the practice of the Privy Council.

SECTION IV :—*Right to refer any matter.*

The powers given to His Majesty by this section are very important and appear to be unlimited. That is, that His Majesty may refer to the Judicial Committee, for consideration, any matter whatsoever He shall think fit. It has been remarked¹ that under this clause there is no limit to the extent and variety of matters referrible by His Majesty to the Judicial Committee. Nevertheless it would be a false interpretation of the section to believe that His Majesty may take away a case from its ordinary jurisdiction in order to refer it to the Judicial Committee. This would put the king and Parliament in contradiction with each other, and is, consequently, impossible in law. What this enactment provides is that there is no limit to matters referrible to the Committee when these matters are not within the province of another tribunal.

Where a matter has been referred by His Majesty to the Judicial Committee, which is not strictly an appealable

¹ Macqueen's Practice, House of Lords and Privy Council, page 689, note d.

grievance, their Lorships may still under this section take it into consideration and admit or dismiss the appeal.¹

SECTION V :—*Hearing and disposing of appeals.*

This section, which provides that no matter or appeal shall be heard or report be made unless before at least four members of the Judicial Committee and that no report be made to Her Majesty unless by the majority of the members present at the hearing, was amended by "an *Act to make further Regulations for facilitating the hearing of appeals and other matters by the Judicial Committee of the Privy Council*" of 1843.² By this last amendment it was made lawful for Her Majesty by order in Council or special direction under Her Royal Sign Manual, to require the presence of only three members of the Judicial Committee to hear and dispose of appeals or other matters, as she may think fit.

Another statute³ has also amended this 5th section by repealing the whole provision of hearing before any four members and by enacting in its place, that "no matter shall be heard, nor shall any Order, Report or Recommendation be made by the Judicial Committee in pursuance of the Act 3 and 4 William IV, ch. 41 or any other Act, unless in the presence of at least three members of the Committee, exclusive of the Lord President of Her Majesty's Privy Council for the time being."

No report can be made unless by the majority of the Lords present at the hearing of the case, although it is to be remarked that no provision is made in case the members might be equally divided. But this last case has not yet given rise to any difficulty for the report is always made unanimously, the dissent, if any, not having been reported in any case yet. The rules observed by the Lords for the distribution of work among themselves are given as follows by Lord Brougham :⁴

¹ See *Jurisprudence* *vo. Appeal*.

² 6 and 7 Vict., ch. 38 sect. I.

³ 14 and 15 Vict., ch. 83, sect. XVI, 1851.

⁴ British Constitution, note at the bottom of page 378.

"The judges, four at least, and they are seldom more, take the causes in rotation as virtually presiding, and each in his turn draws up the judgment with the reasons, and communicates it to the others, who make such alterations as they think fit; and when all are agreed it is delivered as the judgment of the court, or if they differ, as that of the majority, but this has very rarely happened. Occasionally, but most rarely, there has been a second hearing. In point of form it is the decision of the Sovereign, to whom it is reported for approval."

At the end of the section, there is a proviso allowing His Majesty to summon any member of the Privy Council to attend the meetings of the Judicial Committee. The true interpretation of this proviso, it is said, is, that the Sovereign may call certain Privy Councillors to sit in any special case, when by his experience, or science, he may be of great help to the ordinary judges, more particularly when technical difficulties are met with. But this does not confer upon the Crown the right to increase the number of Ordinary Judges of the Committee.

SECTION VI :—*Attendance of Judges.*

This section as well as the 25th, 26th and 27th make rules to secure the attendance at the Judicial Committee of any members who shall happen to be Judges of the Superior Courts of law at Westminster, or Chief Baron of the Court of Exchequer, or Chief Judge of the Court in Bankruptcy, by providing for the nomination of other judges during their absence to perform their duty as such justices. These are details which cannot be of any interest, and moreover have become inoperative since the "*Supreme Court of Judicature Act*," which entirely changed the constitution of the Courts in England.

SECTION VII :—*Taking of new evidence.*

Before this Act, witnesses were frequently examined upon oath before the Privy Council. But their deposition had

never been taken in writing, and moreover, it had always been in cases respecting the conduct of public officers, or of expediency in enforcing Orders in Council, and not in appeals from Courts of justice. This section provides for the nomination of persons to receive such depositions in writing. It is generally done by a Commission referred to the Registrar who is empowered by another section of this Act, to administer the oath.

SECTION VIII :—*Admission of new evidence.—Re-hearing in Court below.*

A special power to admit new evidence is here given to the Judicial Committee. The former practice was, not to admit on appeals any evidence, which had not been produced before the Court below. This legislation may be of great service in cases of equity, especially if exercised with moderation and discretion. It has in fact been made use of in many instances. When fresh evidence is wanted before the Judicial Committee, it is better to allude to it in the petition of appeals, although it has been granted on special petition.

Another power given in this section, to send back the record to the court below for re-hearing, under certain instructions or modifications, is an extraordinary one. It can only be understood in considering the position of the Privy Council with regard to the colonies. This high tribunal having to judge appeals according to the laws of each colony, is required to know the laws of each of them. And when we consider that these colonies represent many different provinces, most of them differing in language, customs, origin and government, we must admit that the Privy Council is entitled to all the help possible, from the Courts below. The end of the section provides that His Majesty in Council may direct that feigned issues may be tried in any Court of His Majesty's dominions abroad.

The feigned issue is a very wise provision of English

law, as it tends to establish general rules for the guidance of decisions in future cases.

SECTION IX :—*Swearing of witnesses.*

This section provides for the swearing of witnesses and the affirmation in lieu of oath in case of the witness being a Quaker or a Moravian. By an Order in Council of the 9th December 1838, besides the members of the Judicial Committee and the Registrar, the Surrogates of the Committee have the right to administer the oath or affirmation.

SECTIONS X, XI, XII, XIII :—*Feigned issues.*

Section X extends the power of directing and trying feigned issues over all courts of justice in the kingdom; the above section VIII had already provided for feigned issues abroad, at the discretion of the Committee.

The other sections regulate the admission of evidence, and the right to direct new trials in those feigned issues, thus:

By section XI, the deposition already given in the first trial by a witness who shall have died or be incapable to give testimony, may be read, or any documents filed, at the discretion of the Committee.

By section XII, the Committee is empowered to direct the examination of the parties as well as other witnesses.

By section XIII, authority is given to the Committee to order new trials generally or upon certain points only, and to admit oral evidence to prove the testimony of a witness who is dead or incapable of repeating his deposition.

SECTION XIV :—*Commissions rogatoires.*

Section XIV gives to the Judicial Committee the right to issue commissions for the examination of witnesses upon interrogatories or otherwise.

SECTION XV :—*Costs.*

This section provides for the costs on the prosecution of any appeals or other matter, leaving them at the discretion

of the Committee. No mention was therein made as to the costs of the respondent, the general rule, heretofore, having been with regard to the allowance of costs, that where the decree or judgment below was reversed, they were not given to an appellant. But, exceptions have been made to this rule in a case of equity; where the appellant had been the victim of the bad faith of his adversary, or where disputes arose in the division of a large estate, and the case had not been instituted before a regular tribunal, the costs were ordered to be paid out of the estate. There was no invariable rule on the subject; and not only were both parties usually condemned to pay their own costs, where the judgment was reversed, but cases have been seen where a successful appellant was ordered to pay the respondent's costs.¹ On the contrary, if the decree was affirmed, costs were generally allowed at the discretion of the Committee. See *vo. Costs*.

This system appeared contrary to justice and was amended by the Act of 1848.²

This amendment establishes the discretionary system, which is generally recognized in all well constituted tribunals, that is, to make the losing party pay all costs, leaving them, however, to the discretion of the court. This system is adopted as the best means of prohibiting incessant litigation of the most needless and vexatious sort, for the party who is in the wrong bears alone all the expenses of the trial. It may also be said that it is a check upon wrong-doing and an encouragement to amicable arrangements of disputed claims. An order in council of the 18th June 1853 confirmed this principle by enacting: "That any former usage or practice of Her Majesty's Privy Council notwithstanding, an appellant who shall succeed in obtaining a reversal or material alteration of any judgment, decree or order appealed from, shall be entitled to recover the costs of the appeal from the respondent, except in cases in which the

¹ *Bertrum vs. Godfrey*, 1 Knapp, p. 381.

² 6th & 7th Vict. chap. 38, sect. XII.

"Lords of the Judicial Committee may think fit otherwise
"to direct."

The ancient practice was to give a certain sum (£20 or £100 according to the nature of the suit); the modern system under the statutes, and Orders in council, refers the taxation of costs, by interlocutory order, to the Registrar to be made according to a tariff. On the return of the allocation the amount of taxation is inserted in the report to Her Majesty, without any mention of the order of reference.

SECTION XVI :—*Judgments to be enrolled.*

It appears that the reports of the general Committee of the Privy Council, and the Orders in Council in judiciary matters were previously enrolled in the books of the Privy Council, in which all matters of political affairs, appointments, and, as a rule, all business transacted in council were entered. Those registers were of course private, and could not be inspected. It was a great evil, especially in case of re-hearing. This section established archives to enroll orders and judgments of the Judicial Committee.

SECTION XVII :—*Reference to the Registrar.*

This section says that the Committee may refer matters to the Registrar in the same manner as they are referred to a master in the Court of Chancery.

It is necessary to know what matters can be referred to a master in Chancery, in order to understand this section. By referring to *Chitty's General Practice* vol. 2. p. 442, we find that the statute authorizes and requires Masters in Chancery to "hear and determine all applications for time to plead, answer, or demur, and for leave to amend bills, and for enlarging publications and all such other matters relating to the conduct of suits in the said court, as the Lord Chancellor, with the advice and assistance of the master of the Rolls and the Vice-Chancellor, or one of them, shall by any general order or orders direct."

But this section goes further and gives power to the Judicial Committee to refer cases to experts, *commissaires-enquêteurs* and accountants. Even references to arbitrators have been granted, by consent of the parties, for the adjustment of disputed accounts, after the principal points in dispute had been determined by the Committee; and, in those cases, the award of the arbitrators has been adopted by the Committee in their report.

SECTION XVIII :—*Registrar.*

By section XVIII the king is authorized to appoint a Registrar to the Privy Council and define his duty.

SECTION XIX :—*Subpœna*

This section gives to the President of the Privy Council for the time being, the power to require and enforce the attendance of witnesses before the Committee and the production of papers under writ of *subpœna*. In case of disobedience, the person in fault is to be dealt with as being in contempt of court.

SECTION XX :—*Time for appealing.*

The time in which an appeal can be obtained from the judgments of a colonial court, as well as the appeal itself, is entirely left to be regulated by provincial statutes, instructions to Governors, orders of the Privy Council or Charters of the Court of Justice. When there is no special law, the established usage at the Privy Council is to take in consideration the application when it has been made within reasonable time. In case an appeal has already been granted in the court below, it must be proceeded with within a year and a day, or it may be dismissed with costs against appellant, on respondent's application. If no petition to dismiss is lodged, no notice is taken at the Committee's

Office of the expiration of the year and a day. But all these matters are discretionary with the Committee. See *Jurisprudence Vo. Appeal and Summary of the Procedure*.

SECTION XXI :—*Execution of Decree.*

This section directs that orders, judgments or decrees of the Committee for the Courts abroad shall be carried into effect as the king in Council shall direct.

In the Province of Quebec, article 1182 of the Code of Civil Procedure provides for the registration of the decree of the Privy Council.

SECTIONS XXII, XXIII, XXIV.

These three sections regulate the appeals of the East India Company from the Sudder Demanny Courts.

SECTIONS XXV, XXVI, XXVII : *See our remarks under section VI.*

These sections determine how the judges of other courts shall be replaced when they are called upon to sit in the Judicial Committee.

SECTION XXVIII :—*Contempts.*

This section has for its object the enforcing of Orders and Decrees, compelling appearances and punishing for contempts. It has been amended by the "*Act to make further Regulations for facilitating the hearing of Appeals and other Matters by the Judicial Committee of the Privy Council*,"¹ which repeals so much of the above section as relates to the powers given to the Judicial Committee to punish for contempt, the same as were given to any Ecclesiastical Court by "*An Act for enforcing the Process upon Contempt in the Courts*

¹ 6 and 7 Vict. ch. 38, sect VI, VII, VIII, IX, X.

*Ecclesiastical of England and Ireland.*¹ The above statute (6 and 7 Vict.) provides for better punishing contempt, compelling appearances, and enforcing judgments, by giving to the Judicial Committee in all cases of Appeal from Ecclesiastical Courts and from Admiralty and Vice-Admiralty Courts the same powers which are possessed by the High Court of Admiralty of England. Of course, this law became inoperative with regard to maritime cases, in England, since this jurisdiction was transferred to the Court of Appeal.

The 8th section of the last recited act enacts that orders of the Judicial Committee may be enforced against persons residing out of Her Majesty's dominions, or having the privilege of peerage, or being a Lord of Parliament, or a member of the House of Commons by way of sequestration of their real and personal estate.

SECTIONS XXIX, XXX, XXXI.

The last three sections settle some points of interior administration.

The 29th section enacts, that the Registrar of the High Court of Admiralty may attend at the hearing of Admiralty and Prize causes before the Judicial Committee. The transfer of those cases to the Court of Appeal renders this section inoperative.

The 30th section enacts, that two members of the Privy Council who shall have held the office of judges in the East Indies or any other dominions, who being appointed, shall attend the sitting of the Judicial Committee shall be entitled severally to an allowance of £400 yearly.

And by 50-51 Vict. ch. 70 sec. 4 (1887), if both are sitting, they are entitled to £800 yearly, if only one is sitting he shall be nevertheless entitled to the same amount.

The 31st and last section enacts that this Act shall not prevent the King from acceding to treaties with any foreign prince appointing certain persons to hear prize Appeals.

¹ 2 and 3 Will IV, ch. 93.

SUMMARY

OF THE

PROCEDURE BEFORE THE JUDICIAL COMMITTEE.

The procedure of the Judicial Committee of the Privy Council is derived from Orders in Council and precedents. It may be practically summed up in the few rules which are given below, and which, of course, only show how an appeal is introduced and brought to a hearing. Incidents, constructions of the law of procedure, Orders in Council and precedents will be found in our "*Notes on the Constitution of the Judicial Committee*" in the preceding pages, and below, in the "*Jurisprudence of the Privy Council*," under such words as : *Appeals, Costs, Evidence, Practice*, etc.

1° SECURITY.

After leave to appeal has been granted, the appellant must give security, as decreed by the Order in Council of the 23rd January 1683. This is generally regulated by the law and practice of each colony. When the appeal is allowed under a special petition, the leave is generally granted subject to the ordinary conditions of appeals *de plano*; if otherwise, the Order in Council giving leave to appeal will contain the conditions to be fulfilled.

2° TRANSCRIPT.

Security having been given, the appellant must cause the transcript to be made and printed either in England or in the colony.

This document must contain the demand, the issue as

joined, the evidence, the proceedings below, the judgments appealed from ; but all merely formal documents are to be omitted, provided they are referred to in the index which must be printed with the transcript.

By a rule issued by the Judicial Committee, on 12th February 1845, it was ordered that the reasons given by the judges of the court below in rendering their judgment shall be communicated to the Registrar or included in the transcript. *See vo. Practice : reasons of the Judges.*

Fifty copies, two of them certified, must be filed with the Registrar, if the transcript is printed abroad ; if printed in England, one hundred copies, must be printed, thirty for each agent, and forty for the Registrar. When the transcript is printed in England this must be done within six months, in appeals from the Cape of Good Hope or from those of the East India Company, and within three months, in all others appeals, from the arrival of the written transcript in England, or the appeal is dismissed without further order, at the discretion of the Committee.

By an Order in Council of the 13th June 1853, when the appeal is on a question of law, the parties may agree, with the sanction of the Registrar, to submit the appeal on a "special case," and on certain printed documents.

The transcript is the only authentic source of information for the Lords of the Committee. Some modifications may be made in it, during the pendency of the appeal, with the leave of the judges, in cases of error or omission.

An Order in Council of the 24 March 1871 has established the following rules for the printing of the transcript ;

Form :—Demy quarto. *Size* :—11 inches in height, 8½ inches in width. *Types* :—For the text, Pica ; for printing accounts, tabular matter and notes, Long Primer. *Lines* :—47 lines in each page of Pica ; each line being 5½ inches or 146 millimetres in length.

3° PETITION OF APPEAL.

The next proceeding after the filing of the transcript is to lodge the petition of appeal.

This petition is a short narrative of the facts, without argument, but with a conclusion demanding the object of the appeal. It is addressed to the Queen in Council.

It must be presented within a year and a day from the date of the leave to appeal, but this delay may be extended if cause is shewn.

The general rule, except for the Province of Quebec, is to admit no petition of appeal, before the transcript is registered. The reason for the exception made in behalf of our Province to present the petition, without transcript, on a certificate of the lower Court containing the date of judgment, the leave to appeal, and the declaration that security had been given, is that by article 1181 of our Code of Civil Procedure, the execution of the judgment appealed from cannot be stayed after six months from the allowance of the appeal, " unless the appellant files in the office of the clerk of appeals, a certificate signed by the clerk of Her Majesty's Privy Council, or any other competent officer, and stating that the appeal has been lodged. "

4^o APPEARANCE.

The respondent must find out when the Petition to Appeal is of record and immediately file his appearance.

If no appearance is produced on behalf of the respondent, the appellant may obtain from the Committee a summons ordering the respondent to appear within two months, which is posted in two public places. On the expiration of this delay, the Lords issue a Peremptory Order giving the respondent six weeks more to appear. If default is again recorded, another Peremptory Order is made ordering the respondent to put in his case within fifteen days, under pain of his case being heard *ex parte*.

Similar orders may be obtained by co-respondents, if the appellant neglects or refuses to apply for them.

It is at this stage of the proceedings that objection to the right of appeal or all other preliminary objections must be made.

5^o CASES.

Both parties being before the Court, or Peremptory Orders having been obtained, the parties must prepare and enter their case.

The case consists of a statement of the facts alleged and proved, of the claims of each of the parties, their arguments and authorities, the pretended errors of the judgments of the court below, and the grounds of the appeal.

If the appeal is on a question of law, it may be submitted on a special case as aforesaid.

They must be printed in the same form, size, types and lines as the transcript, and indexed. An Order of 10th April 1838, ordered that all cases shall have a joint appendix of the documents referred to in the cases.

After each party has lodged his case, copies are exchanged between them or their agents.

The first agent who brings his case for registration, is entitled to an Order calling upon his opponent to file his case within a month. Should he fail to do so, a Peremptory Order is served on him requiring him to file his case within two weeks under pain of the appeal being heard *ex parte*.

According to *Macpherson*,¹ the case is generally prepared by the junior counsel, and revised by the "junior and senior counsel in consultation," and must be signed by them. (Order, 10th May 1730).

The Order in Council of the 26th June 1873, provided that cases must be filed within twelve months from the registration of the transcript, or the appeal may be dismissed.

6^o HEARING.

Cases on both sides being filed, or the delay under a Peremptory Order to put in the case having expired, either of the parties may make application to have the appeal inscribed upon the roll for hearing. This is obtained as of course.

¹ Privy Council Practice, p. 84.

Orders in Council regulating the hearing of cases can be found as far back as 20th February 1627 :

Section II, of this order enacts that at the hearing, the Lords, by questions or otherwise, " are to inform themselves of the truth of the matter of fact, but not to discover any opinion till all be fully heard."

Section V, regarding the inscriptions of cases for hearing, says : " Upon the petitions of suitors, the clerk of the council, who then waits, shall set a note, when the petitions were exhibited, that the Lords may thereby see how the suitors stand in seniority, and according to that and other necessity of occasion, they may be despatched, wherein respect is to be had to the poorest petitioners, that they be not wearied out with over long attendance."

To prevent the putting off of cases for want of preparation on the counsel's part, there are three orders of Council. The *first*, 18th January 1727 ordered that when a day shall be appointed to hear any appeals or complaints, such plea shall not be allowed as a reason to defer the hearing thereof; the *second*, 21st April 1746, makes the order " that when appeals or other causes are put upon the list of business for hearing, the party or parties (at whose request such appeals or causes are set down), shall be in readiness to be heard, whenever the committee shall appoint a day"; the *third*, 9th July 1751, says : " That when the said appeals or causes shall have been so put upon the list of business for hearing, the same be heard in the course they are so set down, without any further notice, order or direction of the committee for that purpose."

On the 23rd February 1828, their Lordships ordered that, in future, cases would take precedence according to the date of their inscription for hearing. Heretofore, they had ranked according to registration of cases.

The appeal must be inscribed during the twelve months from the lodging of the cases, or, on the report of the Registrar, it may be dismissed (Order in Council of the 26th June 1873).

7° COSTS.

As this matter of costs is explained elsewhere¹, only a few remarks are necessary here.

Objections to the taxation of a bill of costs must be made in writing, and the matter brought before the Committee.

The taxing which was formerly made by the Master in Chancery, is now, by the Order in Council of 11th of August 1842, ordered to be made by the Registrar of the Privy Council, according to the following tariff:

Schedule of fees allowed to Solicitors conducting appeals or other business before the Judicial Committee of the Privy Council under Her Majesty's Orders in Council of the 11th August 1842, and the 13th June 1853.

	£	s.	d.
Retaining fee	0	13	4
Perusing official copy of proceedings allowed at the rate of 6s. 8d. for the perusal of 3 brief sheets, or 25 folios.....			
Attendances at the council office, or elsewhere, on ordinary business, such as to enter an appeal or appearance, to make a search, to lodge a petition or affidavit, or to retain counsel.....	0	10	0
Attending at privy council office to examine printed copy of transcript with the original, <i>per diem</i>	2	2	0
Instructions for petition of appeal.....	0	10	0
Drawing petition or case, per folio.....	0	2	0
Copying, per folio.....	0	0	6
Drawing small petitions for Orders etc.....	0	10	0
Instructions for case.....	1	0	0
Attending consultation.....	1	0	0
Correcting proof sheets, per printed sheet.....	0	10	6
Correcting foreign or Indian proof sheets, per printed sheet.....	1	1	0
Attending at council chamber on a petition.....	1	6	8

¹ See under: "Notes on the Constitution of the Judicial Committee" and "Jurisprudence", Vo. costs.

OF THE JUDICIAL COMMITTEE

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	£	s.	d.
Attending council chamber all day on an appeal not called on.....	2	6	8
Attending a hearing.....	3	6	8
Attending a judgment.....	1	6	8
Sessions fee, (for the legal year) equal to four term fees.....	3	8	0
Attending ..tion.....	2	2	0
Attending at council office on the drawing up of minutes for committee report.....	1	1	0

Council office fees on appeals and Petitions to the Queen in Council.

	£	s.	d.
Lodging petition of appeal.....	1	1	0
Entering	1	1	0
Lodging case.....	1	1	0
Entering appearance	0	10	0
Setting down case.....	0	10	0
Summons.....	0	10	0
Committee report.....	1	10	0
Order of Her Majesty, in Council	3	2	6
Committee Order.....	1	12	6
Lodging affidavit	1	1	0
" petition.....	1	1	0
Notice to attend.. ..	0	10	0
Searching books for information for parties.....	0	10	0
Certificate delivered to parties.....	10	0	0
Copies of papers (each side).....	0	5	0
Committee references.....	2	2	0
Lodging caveat.....	1	1	0
Subpoena to witnesses.....	0	10	0
Fee for taxation (appeals).....	3	3	0
Do do do (petitions) ..	1	1	0

FEES ON HEARING APPEALS IN PRIZE CAUSES

Hearing a cause.

	£	s.	d.
To the successful party	5	15	6
To the unsuccessful party.....	2	2	0

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	£	s.	d.
Where both parties may succeed, although the sentence may have been in part reversed	3	18	9
Desertion of appeal	2	17	9

Sentence taken by consent or in panam.

	£	s.	d.
To the successful party to whom the fees of interlocutory are charged by Registrar	4	15	6
Where counsel are heard, cause not determined, each party	2	2	0
Motion by counsel, gaining party	1	1	0
Hearing on admission of allegations or act on petition, gaining party	2	2	0
If part admitted and part rejected, each party	1	1	0

8° COUNSEL AND SOLICITORS.

It is the practice of the Judicial Committee to hear two counsel for each party having different interests.

Rules have been established by an Order in Council dated 31st March 1871 regulating the right of practising as solicitors before the Judicial Committee. This right is given :

First, to every proctor, solicitor, or attorney practising in London, and duly admitted in any of the courts of Westminster, without the payment of any fee.

Second, to every person duly admitted to practice as solicitor by the High Court of Judicature in India or in the colonies respectively. But provided they apply, by petition, to the Lords for leave to be admitted to practice before the Committee ; and then they shall have to pay annually, on the 15th November, a fee of five guineas to the council office.

Any solicitor practising before the Judicial Committee who wilfully acts in violation of the rules and practice of the Privy Council, or who wilfully misconducts himself in prosecuting proceedings, or who refuses or omits to pay council office fees or charges, is liable to an absolute or temporary prohibition to practice before the Privy Council, by

the authority of the lord of the Judicial Committee, upon cause shown at their Lordships' bar.

This order in Council applies only to solicitors practising in England. The parties themselves or any barrister from the colonies may be heard by their Lordships, in their own cases, without any formality.¹

Every solicitor practising before the Judicial Committee is bound previously to subscribe the following declaration :

Form of declaration.

" We, the undersigned, do hereby declare, that we desire
 " and intend to practise as solicitors or agents in appeals
 " and other matters pending before Her Majesty in Coun-
 " cil; and we severally and respectively do hereby engage
 " to observe, submit to, perform, and abide by all and every
 " the orders, rules, regulations, and practice of Her Majes-
 " ty's most Honourable Privy Council and the committees
 " thereof now in force, or hereafter from time to time to be
 " made; and also to pay and discharge, from time to time,
 " when the same shall be demanded, all fees, charges, and
 " sums of money due and payable in respect of any appeal,
 " petition, or other matter in and upon which we shall
 " severally and respectively appear as such solicitors or
 " agents."

Beside the definite rules of procedure enacted by statutes or Orders in Council, the Judicial Committee has general powers ordinarily belonging to Courts of justice. Sec-

¹ The following extract of a letter written to the late Mr Justice R. Mackay was published, in 1862, in the *Lower Canada Jurist*, vol. VI, p. 87:

COUNCIL OFFICE, WHITEHALL.

November, 25th 1881.

" In answer to your question I beg to inform you that the Bar of the Privy Council is an open bar for all advocates duly qualified in the colonies and dependencies from which appeals lie to the Queen in Council, and consequently, any Canadian advocate would be heard by their Lordships in Canadian appeals."

(Signed) HENRY REEVE,

Registrar P. C.

tion 5 of 6 and 7 Vict. ch. 38, gives to the Privy Council, in conducting appeals, the same powers possessed by the Queen in Chancery, the High Court of Admiralty of England, or the Lords Commissioners of appeals in Prize causes respectively ; which powers now are all consolidated in the Court of Appeals and the High Court of Justice, but the same have remained into the Judicial Committee. For reference to those powers, see : *Intervention, Reprise d'instance, Execution, Expertise, etc.*

Some old rules are remarkable, such as will be found, for instance, in the Orders in Council of the 2nd February 1627 :

" III. When any cause is fully heard, the parties are then to retire, and the Lords to debate alone, and if any variety of opinions continue, which cannot be reconciled, then the Lords are to vote it severally, if it be demanded ; and the Lord President, or one of the principal secretaries, if the Lord President be absent, is to take the votes."

" IV. In voting of any cause, the lowest councillor in place is to begin and speak first, and so it is to be carried by most voices ; because every councillor hath equal vote there : and when the business is carried according to the most voices, no publication is afterwards to be made, by any man, how the particular voices and opinions went."

And with reference to the Registrar :

" VII. When any order is agreed upon, the clerk of the council attending shall take notice thereof, in writing, and punctually read, openly, how he hath conceived the sense of the Board, that if anything be mistaken, it may then be reformed ; and, afterwards, when the said clerk shall have drawn the said order at large, in any cause of importance, before he enter the same into the council book, or deliver it to any person, whom it may concern, he is to show the draught to the Lord President, or, in his absence, to one of the secretaries of state, to be allowed and signed under one of their hands, before the entry and delivery thereof."

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DIGEST

OF ALL THE

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A

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ABANDONMENT.

See INSURANCE: *eodem verbo*.

ABANDONMENT OF PROPERTY.

PENALTY FOR REFUSAL.

CARTER V. MOLSON¹

1. Article 2274 of the Civil Code enacts that "any debtor imprisoned or held to bail in a cause wherein judgment for a sum of \$80 or upwards is rendered, is obliged to make a statement under oath and a declaration of abandonment of all his property for the benefit of his creditors according to the rules, and subject to the penalty of imprisonment in certain cases provided in ch. 87 of the C.S. L. C., and in the manner and form specified in the Code of Civil Procedure." The Code of Civil Procedure came in force eleven months later, and contains no specific penalty for neglect to comply to the provisions above cited, although it has provisions relative to abandonment of property.

The Judicial Committee decided that according to art. 1360 of the Code of Civil Procedure, the above article 2274 of the Civil Code was repealed, and that a debtor could not be punished if he refuses to make abandonment of his property, by imprisonment for one year as mentioned in the C. S. L. C. ch. 87, s. 12, sub. s. 1. 2.

LORD BLACKBURN, p. 535 :—"The question, which their Lordships have found to be one of considerable difficulty, depends on the true construction of the two codes of Lower Canada, the Civil Code, more particularly art. 2214 and arts. 2613 and 2614, and the Code of Civil Procedure, more particularly art. 766 and those following it, and art. 1360. There were careful and elaborate provisions for framing the two codes in question; but, notwithstanding all the precautions taken, there may be, and in fact in the present case there are, doubts as to what is the meaning of the language employed. And the Civil Code of Lower Canada, art. 12, is "that when a law is "doubtful or ambiguous it is to be interpreted so as to fulfil the "intention of the Legislature, and to attain the object for which it was passed."

It is therefore material to inquire how and why the codes were

¹ Quebec, 1883 April 18, L. R. VIII Appeal Cases 530.

PENALTY FOR REFUSAL.

enacted, so as to ascertain what was the intention of the Legislature, and what the object for which they were enacted.

First, by Statute 20 Vict., c. 43, which afterwards became the second chapter of the Consolidated Statutes of Lower Canada, Commissioners were appointed, who were directed (secs. 4, 5 and 6), to reduce into one Code, to be called the Civil Code of Lower Canada, those provisions of the laws of Lower Canada which relate to civil matters, and are of a general and permanent character, whether they relate to commercial cases or others, but excepting the laws relating to the seigniorial or feudal tenure, and to reduce into another Code, to be called the Code of Civil Procedure of Lower Canada, those provisions which relate to procedure in civil matters and cases, and are of a general and permanent character. They were directed to embody therein such provisions only as they held to be then actually in force. They might suggest such amendments as they thought desirable, but were to state them separately. And they were directed to follow, as far as might be, the arrangement of the *Code Civil* of France. It was provided that, as the commissioners proceeded with their work from time to time, there should be an opportunity given to the Judges to review their work, and make suggestions to the commissioners, who were to consider, but were not bound to adopt their suggestions. And by sect. 13 the commissioners were required from time to time to incorporate with the proper portions of the said Codes such amendments as the Governor in Council thinks it right to recommend for adoption by the Legislature after considering the reports of the commissioners, and those of the judges if any, but such amendments shall be carefully distinguished from the actual law.

.....
The Civil Code was the first completed and submitted to the Legislature, and it was amended by resolutions agreed to by both houses, but the Legislature did not quite pursue the course indicated by the latter part of sect. 14, sub-sect. 2. By 29 Vict., c. 41, sect. 2, the commissioners were directed to incorporate the amendments with the Civil Code, adapting their form and language (when necessary) to those of the said Code, but without changing their effect, inserting them in their proper places, and striking out of the said Code any part thereof inconsistent with the said amendments.

Power was also given to the Governor to select any Acts and parts of Acts passed during the last and present sessions, and cause them to be incorporated. And power was given to the commissioners to make verbal and formal amendments, and so soon as the said work of incorporation was completed the amended Code was to be submitted to the Governor, who may cause a correct printed copy thereof, attested by his signature and that of the Provincial Secretary, to be deposited in the office of the clerk of the Legislative Council.

.....
A precisely similar course was taken as to the Code of Civil Procedure of Lower Canada, the Statute 29 & 30 Vict., c. 25, being in

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the same words as those of 29 Viet., c. 41, except that (Code of Civil Procedure of Lower Canada) is throughout substituted for (Civil Code of Lower Canada.) The day fixed by the proclamation for the Code coming into force is the 28th day of June, 1867.

So that there was a period of nearly ten months, during which the Civil Code was in force, before the Civil Code of Procedure came into force.

It seems implied in that part of the judgment which states "that there are express provisions "in the Code of Procedure as to those matters," and that "the provisions of Sects. 12 and 18 of the Consolidated Statutes and "Art. 2274 of the Code Civil have thereby been "repealed under Sect. 1360 of the Code of Civil Procedure," that the majority of the Court of Queen's Bench put the construction on Art. 1360 of the Code of Civil Procedure, that it repealed not only all laws in force before the passing of either code, but also all parts of the Civil Code which touched procedure.

The literal meaning of the words "laws in force at the time of the coming into force of this code" includes the Civil Code, for as already pointed out, the Civil Code came into force some months before the Code of Civil Procedure did; but their Lordships are scarcely prepared to hold that the intention and object of the Legislature was that when a matter is included in the Civil Code which might without impropriety have been included in the Code of Procedure, and an express provision is made in the Code of Procedure upon that particular matter, the provisions of the Civil Code are abrogated as being laws concerning procedure in force at the time when the Code of Procedure came into force, the two subjects from their nature overlap, and in the Civil Code of France, as well as in the Canadian Codes much which might well be put into one code is placed in the other. There seems nothing to prevent laws in both codes relating to the same subjects from standing together, unless they are from their nature so inconsistent that the later enactment must be taken to repeal the earlier.

The 20th title of the Canadian Civil Code, relating to imprisonment in civil cases, is one which might have been placed under the head of procedure; and so might the 16th title of the French Civil Code, entitled, "*De la contrainte par corps en matière civile*," have been placed in the "*Code de Procédure civile*." But neither in the Canadian codes nor in the French code has this been done.

The general intention and object of the Legislature seems to have been that the two codes should stand together, and be construed together, and it may well be doubted whether the majority of the Queen's Bench have not given too much effect to the accident that the codes did not come into force on the same day.

From this preamble¹ and the whole scheme of the legislation, their Lordships think that it was one main object of the Legislature to make the codes as one may say self-contained. This object, how-

¹ Preamble of 20 Viet. ch. 43, or Consolidated Statutes, ch. 2.

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ever, has been apparently lost sight of in several places, and, amongst others, in the art. 2274 of the Civil Code, which is in the following words :¹

This cannot be understood, without reading and construing the statute referred to in order to see what rules and what penalties of imprisonment were provided by the statute, and then determining which of them were kept alive by this article; for, though this article does contain an express provision on at least part of chap. 87, and so by art. 2613 and 2614 of the Civil Code does abrogate at least so much of chap. 87, yet it seems impossible to deny that the Legislature did intend, at all events until the Code of Civil Procedure should come into force, to re-enact by reference to the abrogated statute some penalties, and apply them to the things specified in art. 2274. And there is great difficulty in doing this. For though chap. 87, s. 12 (1) does, in certain cases included in art. 2274, but not quite co-extensive with it, require a debtor against whom judgment for 80 dollars or upwards has been rendered to file a statement of his property and creditors, and a declaration of his willingness to abandon the property in his statement mentioned to his creditors, and by sect. 12 (2) does impose penalties on a defendant neglecting to file such statement, yet there are no penalties co-extensive with art. 2274, and there certainly are many penalties which, by chap. 87, s. 18, are imposed upon debtors who have not been arrested, against whom a judgment has gone in a commercial case, which cannot on any construction be kept alive by art. 2274. Those difficulties are all removed if art. 2274 is read as meaning "according to the rules and subject to the penalty provided in certain cases in chap. 87, until the Code of Civil Procedure comes into force, and then in the manner and form specified in the Code of Civil Procedure."

It is not to be denied that this is introducing words not to be found in the enactment, and so far is objectionable. But their Lordships think that art. 2274 of the Civil Code shows an intention on its face to hand over the whole of its subject matter to be dealt with by the provisions of the Civil Code of Procedure, or if that intention cannot be found on its face, then that the law contained in that enactment is "doubtful and ambiguous," and though not without some doubt and difficulty, they think that the object and intention of the Legislature is such as to justify this construction.

If it is adopted all difficulty vanishes. The articles of the Code of Civil Procedure do impose many penalties, but they do not impose the penalty of imprisonment for a year on the person refusing to perform that duty which he is by the express terms of art. 766 bound to perform.

The question how he is to be compelled to do so does not arise on this appeal. It is enough to say that he is not liable to imprisonment for a year.

¹ For the article see the heading of this case.

ACCOUNT

ACCOUNT SETTLED.

McKELLAR V. WALLACE ¹

2. The parties had settled their accounts by striking a general balance, reserving one item for future investigation which afterwards was also settled by a promissory note. This promissory note not having been paid at maturity, one of the parties brought an action to re-open the accounts. It was held that the settlement amounted to an adjustment of the general account between them, and that the accounts so closed could not, in the absence of false representations and fraud, be re-opened because the note had been dishonoured.

THE RIGHT HON. T. PEMBERTON LEIGH, p. 401:—The law in cases of this kind I apprehend to be perfectly clear. Parties having accounts between them, may meet and agree to settle those accounts by the ascertainment of the exact balance; and, if they mean to ascertain the exact balance, it may be necessary for that purpose, and probably is necessary in most cases, that vouchers should be produced, and that all the information which is possessed on one side and the other should be furnished in the settlement of those accounts; and, if it afterwards turn out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a court of equity. If, on the other hand, persons meet and agree, not to ascertain the exact balance but agree to take a gross sum as the balance; a sum which one is willing to pay, and the other is content to receive as the result of those accounts; it is obvious, that the production of vouchers is entirely out of the question, and errors in the account are so also, for the very object of the parties is to avoid the necessity for producing those vouchers, upon the assumption that there are or may be errors in the account so settled; therefore, it is either an account stated and settled, in the formal sense of that expression, or, it is the case of a settlement by compromise. In either case it may be vitiated by fraud; in either case it is good for nothing, if, either from the collusion of the parties, upon the circumstances under which the settlement takes place, it is proved, in a Court of Equity, that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involved, or from misrepresentations made on the one side or the other, as it ought to have been, and that injustice has been done to either side.

BOOKS OF ACCOUNT.

SEETUL BAHOO V. HURKISHEN DOSS ²

3. In a case of rendering of account, a court should not deliver its judgment before the original books of account

¹ Calcutta, 1853 June 20, VIII Moore 378.

² Bengal, 1834 Feb. 8, III Knapp 255.

BOOKS OF ACCOUNT.

have been inspected and verified, unless by some means it can be satisfied, that there is no ground whatever in the objections made by the opposing party.

The record was sent to the court below for the inspection of the original books of the firm in litigation.

DEFAULT OF THE ACCOUNTING PARTY.

RETEMeyer v. OBERMULLER ¹

4. The accounting party having made default to render his accounts in the form ordered by the court, after the rejection of his first account which were only intromissions in his qualities, was condemned and his property seized and placed in custody to abide the sentence of the court. On an appeal and cross-appeal, the Privy Council, setting aside all objections, reviewed the items of the account filed. The Appellant and the Respondent succeeding in part, no cost were awarded.

DUTY OF AGENT TO. See PRINCIPAL AND AGENT: *iusdem verbis*.

ERRORS IN ACCOUNTS.

DANIEL v. SAINCLAIR ²

5. A settled account may be re-opened to correct mistakes when both parties misunderstood the facts and the law, and compound interest was charged instead of simple interest.

6. In the absence of special understanding simple interest only can be charged.

7. There are cases in the courts of common law in which it has been held that money paid under a mistake of law cannot be recovered, and it has been further held that, under certain circumstances, the giving credit in an account may be treated as so far equivalent to payment as to prevent sums wrongly credited being made the subject of set-off. *Skyring v. Greenwood* 4 B. & C. 281. But in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn; and in a great many cases relief has been and can be given to a party who has dealt with his property under the influence of a mistake. *Earl Beauchamp v. Winn*, *Law Rep.* 6 H. L. 234; *Cooper v. Phibbs*, *Law Rep.* 2 H. L. 170; *McCarthy v. Devlin*, 2 *Russ & M'ay* 614; *Livesey v. Livesey*, 3 *Russ* 287.

¹ Berbice, 1838 Feb. 8, II Moore 93.

New Zealand, 1881 Feb. 22, L. R. VI Appeal Cases 181.

JOINT ACCOUNTS.

LINDSAY V. DUFF ¹

8. According to the principles of English law, parties subject to a joint account are liable jointly and severally.

9. And where a case has been decided by the Privy Council under the English law and rules of procedure, the court below is wrong in applying the Roman-Dutch law to the proceedings in execution of the judgment.

PRESCRIPTION.

SMITH V. O'GRADY ²

10. Lapse of time will not alone be a bar to the right of an executor to have an account of the testator's estate taken with a view to ascertain his liabilities.

WHO IS LIABLE TO RENDER ACCOUNT.

ERMATINGER V. GUGY ³

11. A clerk and manager of a sheriff, who received and paid, in that capacity, various sums of money in the course of the business of the office, is not liable to an action or bill for account.

LORD CAMPBELL, p. 14:—There is no doubt that where a person is employed by another to transact business for his employer, and is allowed to have money in his hands, in the character of agent or clerk, he is liable to account for such money. But there is a great difference between a party so circumstanced, and one who, being immediately under the eye of his employer, and subject to his daily control, keeping, in fact, not his own, but his employer's accounts, entering them in his master's books, and giving over the vouchers and receipts to his custody. Whether such a dealing can constitute the relation of agent and principal, so as to make the former liable to an action, or bill for account, must depend on the especial facts of the case; *prima facie*, such liability would not exist.

ACQUIESCENCE

BY SILENCE.

THE EAST INDIA COMPANY V. ROBERTSON ET AL. ⁴

12. In Madras, the government of the East India Company created a civil service annuity which was to be provided half by subscriptions from the civil employees and half by the company. The subscriptions came in excess of what was

¹ Ceylon, 1862 June 20, XV Moore 452.

² Jamaica, 1870 July 7, VII Moore N. S. 106.

³ Lower Canada, 1844 Nov. 30, V Moore 1.

⁴ Madras, 1859 March 17, XII Moore 400.

BY SILENCE.

required for the share of the civil servants, and the trustee introduced the practice of refunding part of the money paid by the civil servants when an excess of subscriptions had been paid beyond the half value of the annuity. The Privy Council, on account of this uncontested practice, held that the company had, by their conduct, acquiesced in it and precluded themselves from disputing the right of the subscribers to the refund, although no law or rules authorized such refund.

IN JUDGMENT.

LOUGHNAN V. HAJI JOOSUE BHULLADINA. The "HYDROOS" ¹

13. A special application for costs made by a losing party in a suit, after the rendering of the judgment, is an acquiescence in the judgment, and is a bar to a demand for leave of appeal.

BROWN V. DAVENPORT ²

14. The taxation and receipt of the bill of costs is an acquiescence in the judgment, which prevents an appeal.

15. A judgment of the Prerogative Court of York, granted the probate of a will with costs to be paid out of the Testator's estate to both parties. These costs were taxed and paid, both proctors attending. About ten months after, application was made by the party originally opposing the will for leave to appeal. Such application refused, on the ground that according to the universal practice of the Judicial Committee, the taxation and receipt of the costs was an acquiescence in the sentence, and perempted the appeal.

BEAUDRY V. THE MAYOR & AL. OF MONTREAL ³

16. A mere respectful submission to the ruling of a court or of a judge is not an acquiescence in the legal sense.

LORD CHIEF BARON POLLOCK, p. 426:—It seems to us that when the justices decided that they had no power to administer an oath, and, therefore (as we consider), declined to swear the witnesses and receive their testimony, the claimant could do nothing more than he did, it was not his business to protest a court, but respectfully to submit to a legal decision. In order to prove that he acquiesced, and waived his right to complain of an illegal decision, it ought to be shown that he said or did something to give the

¹ Bombay, 1851 Feb. 18, VII Moore 373.

² York, 1857 July 21, XI Moore 297.

³ Lower Canada, 1858 Feb. 5, XI Moore 400.

IN JUDGMENT.

court a jurisdiction which the act in question did not give them. Mere respectful acquiescence, or submission to the ruling of the justices, will not, we think, amount to a waiver.

THE "BRINHILDA" ¹

17. When a judgment grants damages without assessing them, the demand by one of the parties for an assessment of the damages amounts to acquiescence in the judgment, and his right of appeal is thereby perempted. *The ship Clifton*, 3 Knapp P. C. 375; 3 Hagg. Adm. 117.

IN PLEADINGS. See PRACTICE: *iusdem verbis*.

OPERATES AS A RELEASE.**MOTZ V. MOREAU ²**

18. A settlement by a minor with his tutor, based on an inventory incorrectly made, accounts illegally rendered, although voidable, cannot be set aside if evidence shows that subsequent transactions had taken place between the minor and tutor, after the former was of age. These transactions amounting to a release of all claims on the part of the minor. Claims although not barred by prescription may be extinguished by release or destroyed by conduct operating as a release.

19. The fact that such assignments and dealings had not been repudiated by the minor, when of age, until after the death of the tutor, speaks strongly against the claim of the minor for an account and inventory, and to set aside the assignment.

POWER TO ACQUIESCE.

**LA BANQUE JACQUES-CARTIER V. LA BANQUE D'ÉPARGNE DE
LA CITÉ ET DU DISTRICT ³**

20. Where a manager of a bank has made entries in the books of the bank, so as to represent the bank as a debtor, in respect of a sum which he had borrowed for his own purposes, the acquiescence and ratification by the silence of the subsequent liquidating authorities, would not render the bank liable to pay a debt which it never owed, as the liquidators could not bind the bank by their acquiescence. The doctrine of the court below overruled.

¹ V. Admiralty, 1891 March 15, XLV Law Times N. S. 389.

² Lower Canada, 1859 July 7, XIII Moore 376.

³ Québec, 1887 Nov 15, L. R. XIII Appeal Cases 111.

POWER TO ACQUIESCE.

LORD FITZGERALD, p. 118:—Acquiescence and ratification must be founded on a full knowledge of the facts, and further it must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction.

SALE OF SHIP BY MASTER.

LAPRAIK V. BURROWS. THE "AUSTRALIA" ¹

21. Unnecessary delay on the part of the owner to disapprove and contest the sale of the ship by the master, may amount to an acquiescence in the sale and a ratification of the same.

THE RIGHT HON. H. LUSHINGTON, p. 158:—Now, it is very true that delay may not destroy the right of a party to institute a suit; but when unnecessary delay arises, and when injury to others may result from that delay, that delay may import acquiescence in the sale; and if there be acquiescence in the sale, then, according to all the authorities, however unauthorized the sale might have been at its commencement, it is then ratified by the act of the owner himself.

UNDIVIDED POSSESSION.

HUMPHREY V. NOWLAND ²

22. Where waste lands, in a colony, have been in the possession of different persons, without any protest or complaint from any of them, and neither has insisted on the exclusive possession for about fifty years, it is no longer in the power of the representatives of the first lawful possessor, to bring trespass against the representatives of the other. The latter may oppose acquiescence, which is a principle of universal application.

ACTION

CAUSE OF. See PRACTICE: *iisdem verbis*.

CROSS-ACTION. See PRACTICE: *iisdem verbis*.

EN DÉNONCIATION DE NOUVEL ŒUVRE.

BROWN V. GUGY ³

23. By the old French law, *action en dénonciation de nouvel œuvre* can only be brought by a person to stop the progress of a work infringing upon his right, or to obtain security against damage that may result from it; but such actions cannot be brought after the work is completed.

¹ Vice-Admiralty, 1859 July 19, XIII Moore 132.

² New South Wales, 1862 March 5, VI Law Times N. S. 116.

³ Lower Canada, 1863 Dec. 8, II Moore N. S. 341.

EN DÉNONCIATION DE NOUVEL ŒUVRE.

LORD KINGSDOWN, p. 361.—But the action *en dénonciation de nouvel œuvre* is of a different description from the present; is founded upon a different state of circumstances; and seeks different relief. In such an action the plaintiff claims protection against a work commenced, and still in progress, by which, if completed, he alleges that he will be injured.

If such an action be brought, it appears that the judge may either interdict the further progress of the work, or require security to be given by the defendant to the plaintiff against any injury which he may sustain; but when the work is completed this form of action is no longer competent.

This appears to have been the law of Rome. In the Dig. Lib. XLIII, tit. XV. "*De ripa munienda*," after a statement that any protection to the banks of a public river must be made in such a manner as not to hinder navigation, so that any person who apprehends injury from the work may apply to the *Prætor* for an interdict to restrain it, and may obtain security, we find this passage:—§ 5. "*Etenim curandum fuit; ut eis ante opus factum caveretur. Nam post opus factum, persequendi hoc interdicto nulla facultas superest, etiamsi quid damni postea datum fuerit: sed Lege Aquilia experiendum est.*"

The law and form of procedure of Rome seem in this respect to have been adopted into the law of France.

In *Daviel*, "*Traité des Cours d'Eau*." Tit. "*Du domaine public*," par. 471, it is distinctly laid down that, by the old French law, that is, by the law now prevailing in Lower Canada, the *dénonciation de nouvel œuvre* could only be maintained, if instituted before the work was completed, though by an alteration introduced by the French code, the law in this respect is now altered, and the action may be maintained in respect of a work either "*fait ou commencé*."

See RAILWAY: *powers of Railway Companies*.

24. Works on public domain may be proceeded against by public officers or interested parties. See ACTION.

FOR FREIGHT AND SALVAGE. See PRACTICE: *iisdem verbis*.

POSSESSORY.

DE GASPÉ V. BESSENER¹

25. The object of a possessory action according to articles 946 and 948 of the Code of Civil Procedure of the Province of Quebec, must be certain and well described. If it is a piece of land, it must be distinguished by admitted bounds, or, if contested, by boundaries of some description within the terms of article 52 of the same Code.

26. The plaintiff must also prove a possession of a year and a day, based on a title capable of being the foundation

¹ Québec, 1898 Déc. 5, III L. R. IV Appel Cases 135.

POSSESSORY.

of prescription, continuous, uninterrupted, peaceable, public, unequivocal, and *à titre de propriétaire*.

SIR JAMES W. COLVILLE, p. 145 :—Moreover, it seems reasonable that the party who relies upon mere proof of actual possession and does not shew a possession commencing with title, should prove a possession from which title may be presumed, and therefore, a possession which, if continued during the period of prescription, would ripen into a title by prescription.

RIGHT TO SUE.

AGACIO V. FORBES¹

27. When several persons are benefited by a contract made by one of them, the latter is competent to sue upon the contract in his own name, although the other parties for whose benefit the contract was made may be entitled also to sue upon it; except where it is impossible to split the consideration into parts, e. g. in a case where an advance of money is to be made not by a partner, but by his firm, there it is a joint consideration in no manner separable, so as to apply any part of it to the separate partners.

PORTEOUS V. REYNAR²

28. Agents are prohibited from bringing suit in their names by article 19th Code of Civil Procedure of the Province of Quebec. But this article is not applicable to trustees in whom the subject of the trust has been vested in property and in possession for the benefit of third parties, and who have duties to perform in the protection or realization of the trust estate.

29. Where trustees sold property over which they had possession and title acquired from an assignee, under the Insolvent Act of 1875, it was held that they were entitled to sue the purchaser to whom they had delivered possession, upon his covenant to pay the balance of the purchase money. The cases of *Browne v. Pinsoneault*³; and *Burland v. Moffatt*⁴, were overruled.

30. Their Lordships first commented upon the judgment of the Supreme Court of Canada in the case of *Browne v. Pinsoneault* in which it was held that a voluntarily assignment by an insolvent debtor of his estate and property, for the benefit of his creditors, did not confer upon the assignee the right to sue or defend, in his own name, the actions

¹ Hong Kong, 1861 Feb. 4, IV Law Times N. S. 155.

² Québec, 1887 Nov. 15, L. R. XIII Appeal Cases 120.

³ 3 S. C. R. 102.

⁴ 11 S. C. R. 76.

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accruing with regard to the estates and property assigned. Then, upon the judgment of the same Court in the case of *Burland v. Moffatt* which confirmed the same principle.

LORD FITZGERALD, p. 131:—Their Lordship have now to consider these two decisions, of which the earliest was *Brown v. Pinsonnault*, reported in 3 Supreme Court of Canada Reports, p. 102, on appeal from the Court of Queen's Bench. There were two questions. The first was whether a particular contract was terminated by *force majeure*. The court so held, and that formed a decision on the merits terminating the action. The second was whether the appellants as trustees for the creditors of Steele, had a right to sustain the action for Steele's creditors, though the contract was with them, the action, if any, belonging to the creditors under Article 19, and not to them. Mr. Justice Taschereau delivered the judgment of the court on both points; but the second, or technical question, receives the first attention. He says:—"The plaintiffs sue in their quality of trustees duly named of the creditors of Steele. The rule with us, contained in Article 19 of the Code of Civil Procedure, is that 'no one can sue par procureur.' Of course in certain cases, when specially authorized by law to do so, certain trustees may sue and appear before the courts as such; so can assignees under the Insolvency Acts; but here the plaintiffs have no such standing—they are merely the attorneys of Steele's creditors. It is true that Pinsonnault passed the deed of April, 1879, with them, acting in their quality of such trustees, but this does not give them any right to appear as such before a court of justice."

Moffatt v. Burland, which was the other case, appears to have been decided on the 27th of May, 1884. It came before the Court of Queen's Bench at Montreal, and the head note is this: "(1) A sale of a chattel may be considered as a mere pledge instead of an actual sale, and invalid as a pledge for want of delivery and possession. (2) The assignee under a voluntary deed of assignment by a debtor for the benefit of his creditors, can as such assignee sue and be sued in reference to the estate and property assigned to him." With the decision of that court on the main question their lordships have now no concern, but the judgment of Chief Justice Dorion on the second question is remarkable, and deserves the closest consideration. The very learned Chief Justice points out that the question was whether the appellant as *cessionnaire* from the debtor for the benefit of creditors, was entitled to resist the action in his own name. He was not plaintiff in the suit, but was sued as defendant in respect of the trust property in his possession. The Chief Justice observes:—"But it is contended that the defendant, as the assignee of Gebhart & Co., being a mere agent or attorney, has no quality and no interest as such to appear in a court of justice and urge any objection against the title of the respondent. Now, is this a transaction in which the old rule 'Personne ne plaide par procureur,' embodied in Article 19, does apply? We have no hesitation in saying it is not." His Lordship, in a most able, elaborate, and learned judgment, considers the authorities,

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both French and French-Canadian, that bear on the question, and observes: "As far as we can refer back for precedents in the courts of Lower Canada we find that assignees or trustees vested by voluntary agreements with the estate of insolvent debtors for the benefit of their creditors have invariably, with one or two exceptional cases, been admitted to urge before courts of justice the claims and rights of the estates which they represented as such assignees or trustees." Dealing with the Canadian authorities, which he describes as an unbroken chain of precedents going as far back as 1811, he adds:—"That the jurisprudence of a country on any given case, when certain, is not only the best, but the sole authentic guide of what the law is now on the subject." We gather also from his Lordship's judgment that the rule of procedure in article 19 is applicable only to a mere agent.

Burland v. Moffatt is reported on appeal from the Court of Queen's Bench to the Supreme Court of Canada in the 11th Supreme Court Reports, p. 76. The judgment of the Supreme Court is the judgment of Mr. Justice Taschereau. He says that "*Nul ne peut plaider par procureur*" is, and always has been, the law of Lower Canada.

The case on the merits is so mixed up with the question of procedure that it is difficult to disentangle them; but undoubtedly the decision of the court on the technical question of procedure rests on the supposed rule that a voluntary assignee in trust for creditors comes within the article "*Nul ne peut plaider par procureur*," and adopts the decision of Mr. Justice Badgley that the assignees of an insolvent cannot "ester en justice" for the creditors.

Their Lordships cannot interfere authoritatively with either of those decisions, but they may express their opinion on them for future guidance; and their Lordships have no hesitation in saying that the reasoning and the decision of the Supreme Court in relation to the exception founded on Article 19 of the Code of Civil Procedure are not satisfactory, and that on the contrary they adopt the reasoning and decision of Dorion, C.J., in *Burland v. Moffatt*, as consistent with reason and law.

Their Lordships having so disposed of the two decisions of the Supreme Court, which governed the Court of Queen's Bench, proceed to deal with the present case.

On this appeal they entertain not a shade of doubt that the decision of the Court of Queen's Bench was erroneous, and that the decision of the Superior Court was correct in fact and in law, and ought to be restored; and their Lordships would have come to the same conclusion if the facts of this case were in effect similar to and had not gone beyond both *Brown v. Pinsonnault* and *Moffatt v. Burland*. Their Lordships entertain the view that Article 19 is applicable to mere agents or mandataries who are authorized to act for another or others, and who have no estate or interest in the subject of the trusts, but is not applicable to trustees in whom the subject of the trust has been vested in property and in possession for the benefit of third parties, and who have duties to perform in the protection or realization of the trust estate. The case before

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their Lordships is so different that even if the two preceding decisions were untouched they would not necessarily affect the decision of their Lordships on the present appeal. This is not a case of a mere voluntary cession to a trustee for the benefit of creditors, but of an assignment under the Insolvent Acts to the official assignee for the purpose of realization. That officer could sue and must sue in his own name, though he has no beneficial interest. The present plaintiffs derive their title from him with the assent of all the creditors, and they are the assignees of all his rights, so far as he could transfer those rights. In addition, by the composition arrangement entered into under the provisions of the 49th section of the Insolvent Act, and the subsequent acts springing from that composition, the estates moveable and immovable have been vested in the plaintiffs in possession and in property under a mandate, to preserve, to manage, to realise, to pay off charges, and distribute the surplus. The trustees, too, are empowered to act independently of the creditors in performance of their obligations and duties, and are especially authorized to enter into contracts and to enforce them. The act of sale in the present case was regular and lawful. The plaintiffs as trustees, sold property to the defendant, of which they were lawfully possessed, and to which they had title. He received that title and that possession from them. They were to receive the purchase money, and he covenanted to pay the balance of that purchase money to them. The action is brought by the trustees on that covenant, and if they cannot enforce it in the present action there is some difficulty in defining what the remedy, if any, may be.

Their Lordships are of opinion that to hold that the present suit could not be maintained, and in the present form, would do considerable mischief, and practically defeat those compromises which constantly take place in carrying into operation the provisions of the Insolvent Act, and which can rarely be made effective without the introduction of trustees. They do not forget that in ordinary trust cases the estate is vested in the person of the trustee to accomplish the ends and purposes of the trust. In order to create an effectual trust the subject is usually vested in the trustee to preserve it, and deal with it for the objects contemplated, and whatever is essential to the purposes of the trust, if not expressed, is usually implied: thus, for instance, if trustees are to recover and distribute funds, they may institute and carry on actions, recover payment, and discharge the debtors.

Upon the whole their Lordships are clearly of opinion that the judgment of the Court of Queen's Bench should be reversed, the judgment of the Superior Court reinstated, and the appeal to the Court of Queen's Bench dismissed with costs, and their lordships will so humbly advise Her Majesty. The costs of this appeal will be paid by the respondent.

HAWKSFORD ET AL. V. GIFFORD¹

31. A judgment obtained in England is, in a colony, only evidence of a debt. In an action upon such judgment,

¹ Jersey. 1887 Dec. 18, LVI Law Times N. S. 32.

RIGHT TO SUE.

other persons cannot be sued jointly, with the debtor to obtain payment of a debt, merely on the allegation that they hold, as trustees, property of which the debtor is the beneficial owner.

THE "GLAMORGANSHIRE" ¹

32. In an action for damages brought by the owners of goods shipped, against the owners of the ship, it was held that although the plaintiffs had indorsed their bill of lading to a bank to secure a loan of money, they retained a sufficient interest in the cargo to enable them to maintain the suit. *See* *VO FABRIQUE*.

RIGHT OF A PARTNER TO SUE ALONE. *See* PARTNERSHIP: *iusdem verbis*.

ADMINISTRATOR

See TESTAMENTARY EXECUTOR.

ADMISSIONS

See PRINCIPAL AND AGENT: *Admissions of agent*.

ADVANCES

See BANK AND BANKING, PRINCIPAL AND AGENT, TESTAMENTARY EXECUTORS.

ADVOCATE

See ATTORNEY.

AFFREIGHTMENT**CONSTRUCTION OF CHARTER-PARTY.**

THE OWNERS OF THE "NORWAY" *V.* ASHBURNER ²

33. There was a guarantee, in a charter-party, that the vessel should carry 3000 tons dead weight upon a draught of 26 feet of water. The ship could carry the specified quantity in salt water, but could not in fresh water. The question was: does the guarantee then apply to salt water only, or to fresh water as well as salt? The Judicial Committee held that it applies to fresh water as well as salt. *See* CONTRACT: *Construction*.

DAMAGES FOR DELAY IN SHIPPING.

ANDERSON *V.* OWNERS OF THE "San Roman" ³

34. An apprehension of capture sufficient in ordinary circumstances to affect the mind of a prudent and courageous master will justify delay in the prosecution of a voyage.

¹ S. C. China and Japan, 1888 March 22, L. R. XIII Appeal Cases 454.

² Admiralty, 1865 June 28, III Moore N. S. 245.

³ Admiralty, 1873 Feb. 4, L. R. V. P. C. 301.

DAMAGES FOR DELAY IN SHIPPING.

ELLIOTT ET AL. V. LORD ET AL. THE "GRESHAM" ¹

35. The action was to recover damages in the nature of demurrage for the detention of appellants' ship. The charter party contained the condition that the ship was to go to *Sydney* "and there load from the factors of the said merchant a full and complete cargo of coals, taking her turn with other steamers, but taking precedence of sailing vessels, and receive prompt despatch in loading and discharging, and to load and discharge always afloat." It was proved that the ship was unduly detained on account of the deficiency of coals, at the mine. The defendants were held responsible and condemned to pay £850 damages.

SIR RICHARD COUCH, p. 26:—The arrival of the "Gresham" having been notified to the defendants' agents on the 19th of July, the plaintiffs were, by the terms of the charter-party, entitled to a full and complete cargo of coals on that day. The respondents' counsel did not dispute that when the ship is ready to load the charterers must have a cargo ready, but he contended that they were not bound to do anything till the ship was in her turn, and it was not shown that she did not begin to load before the 5th of August because the cargo was not ready. The facts, however, are, that the defendants employed the same person, the agent of the coal companies, to load the "Gresham" as was employed to load the "Hibernia." In consequence of the delay in getting the coals down from the mines, there was not a sufficient supply at the port, by which the loading of the "Hibernia" was delayed. The deficiency of coals, and not the waiting for her turn, was the cause of the "Gresham" not sooner obtaining her cargo.

The defendants undertook that the ship should receive prompt despatch in loading, and their Lordships are of opinion that they are responsible for this delay.

LIEN ON CARGO FOR FREIGHT.

HOW ET AL. V. KIRCHNER ET AL. ²

36. The owners of a ship have a lien upon the cargo for freight, but such lien may be destroyed, if they enter into a contract at variance with that lien; as where they by contract agree to be paid after delivery of the cargo, and not at the time of delivery.

37. The bill of lading in this cause contained this condition: "Freight for the same goods to be paid by the shippers;" and in the margin of the bill: "Freight payable one month after sailing, ship lost or not lost." The owners of the ship on the arrival at her destination claimed a lien

¹ Quebec, 1883 March 14, 52 L. J. P. C. 23.

² New South Wales, 1857 Dec. 16, XI Moore 21.

LIEN ON CARGO FOR FREIGHT.

on the goods for the freight, and refused to deliver the goods to the consignees until the freight had been paid.

The Judicial Committee decided that the ship-owner had no lien on the goods consigned, as the sum claimed was not freight, properly so called, and was concluded by the contract, which stipulated for a payment to be made in lieu of freight, and to be made at a fixed period having no reference to the delivery of the goods.

LORD WENSLEYDALE, p. 34.—The question lies in the narrowest possible compass, and we have no doubt as to the law upon the subject, which is, that for freight, properly so called, that is, for the carriage, conveyance, and delivery of goods, a ship-owner is entitled to a lien upon the cargo, unless he has entered into a contract at variance with that lien; as, for example, in some of the cases which have been cited in the argument, where the contract is to pay after the delivery of the cargo, and not at the time of the delivery of the cargo.

KIRCHNER V. VENUS¹

38. The bill of lading in this case declared that the goods would be at the shipper's order or assigns, "he or they paying freight for the goods here as per margin." In the margin it was entered that:—"Freight payable in *Liverpool* one month after sailing, vessel lost or not lost." The bill of lading passed into the hands of indorsees for value. When the ship came into port, the master was advised by the ship-owner that the sum agreed to be paid as freight had not been paid, and delivery of the goods was refused to the assignees of the bill of lading unless freight was paid, claiming a lien on the goods for the unpaid freight.

The Judicial Committee, reversing the judgment of the court below, held that the amount agreed to be paid by the shippers at the port of shipment, one month after sailing of a ship, did not acquire the legal incident of freight, though described under that name in the bill of lading, it being merely money to be paid for taking goods on board and undertaking to carry, and not for carrying the goods; and that there is, in such case, no right of lien on the goods by the ship-owner in respect of such sum of money being unpaid.

39. That where a bill of lading provides that the freight is payable to a third party, and not to the ship-owner, payment for freight to the master or ship-owner, would be no answer to an action in *England* in the name of the ship-owner for non payment of freight.

¹ New South Wales, 1859 Feb. 5, XII Moore 361.

LIEN ON CARGO FOR FREIGHT.

LORD KINGSDOWN, p. 390.—The right of lien may arise either by implication of law, or by express contract between the parties.

Freight is the reward payable to the carrier for the safe carriage and delivery of goods. It is payable only on safe carriage and delivery; if the goods are lost on the voyage, nothing is payable; On the other hand, if the goods are safely carried, the master of the ship has a lien on the goods for the amount of the freight due for such carriage, and cannot be compelled to part with the goods till such freight be paid. These incidents to freight exist by rule of law, without reference to any bill of lading, or other written contract between the parties.

But a sum of money payable before the arrival of the ship at her port of discharge, and payable by the shippers of the goods at the port of shipment, does not acquire the legal character of freight, because it is described under that name in a bill of lading, nor does it acquire the legal incidents of freight. It is, in effect, money to be paid for taking the goods on board and undertaking to carry, and for carrying them. This was, in substance, decided by the cases of *Blakey vs. Dixon*, 2 Bos. & Pul. 321; and *Andrew v. Moorhouse*, 5 Taunt. 435.

In the former case the declaration alleged that in consideration of the plaintiff having taken on board his ship certain goods to be carried to *Surinam*, the defendant undertook to pay him the money due to him for freight and carriage of the same on the delivery of the bill of lading. It was held by the court that the declaration was bad on demurrer, on the ground that it claimed money due for freight, whereas nothing could be due for freight except for actual carriage of the goods. In the case of *Andrew vs. Moorhouse*, where the shipper of goods had the option either of paying freight on the delivery of the goods at the port of discharge, or of paying it at a less rate at the port of shipment on the sailing of the ship, and he elected to pay at the port of shipment, he was held not to be relieved from his obligation to make the payment, because the goods were lost on the voyage, and, therefore, no freight, in the proper sense of the expression, ever became due.

No doubt parties who have superseded by a special contract the rights and obligations which the law attaches to freight in its legal sense may, if they think fit, create a lien on the goods for the performance of the agreement into which they have entered, and they may do this either by express conditions contained in the contract itself, or by agreeing that in case of failure of performance of that agreement, the right of lien for what is due shall subsist as if there had been an agreement for freight. But in such case the right of lien depends entirely on the agreement, and if the parties have not, in fact, made such a contract it is very difficult to understand upon what grounds it can be implied, or why, upon failure of performance of the agreement which they have made, the law is to substitute for it another and very different contract which they have not made. To use the language of Lord Ellenborough in *Stevenson vs. Blacklock* (1 Man & Sel. 543,) "where there is an express

LIEN ON CARGO FOR FREIGHT.

antecedent contract between the parties, a lien which grows out of an implied contract, does not arise."

The inconveniences of establishing such a lien are very serious. If the shipowner has a lien on the goods, unless the money agreed to be paid at the port of shipment has actually been paid, what, on arriving at the port of discharge, is the master to do? In many cases, probably in most cases, he can have no means of knowing whether the payment has or has not been made; the fact itself may be a matter of uncertainty, depending on the state of disputed accounts between the shipowner and the merchant; or the money, though not paid at the day, may have been subsequently paid; or securities may have been taken, or other arrangements made for giving time. Is the master to withhold the goods from the consignee till by communication with the port of shipment all these matters have been cleared up? This communication may occupy weeks, or even months, and the profit or loss on the adventure, and even the well-being or ruin of the consignee, may depend, from the state of the markets, on the delivery of the goods a day or two sooner or later.

Take, again, the case of an indorsement of a bill of lading. We know how largely these instruments are used for the purpose of raising money on the credit of the goods consigned by them. If an indorsee on looking at the bill sees that the goods are subject to the payment of freight, he calculates the value of the goods, and measures his own advances accordingly. So, if he knows that the goods are not subject to freight, and that the bill of lading is what is termed "a clean bill," he is equally relieved from embarrassment; but how can he make advances with any safety, if it be left in doubt on the bill of lading whether the goods are to be liable to charge for carriage or not; if the liability of the goods to the payment of freight depends, not on the agreement appearing on the bill of lading, but on the question whether that agreement has or not been actually performed, and if the title to receive the goods is liable to be suspended till these facts have been ascertained?

P. 397.—Having again considered the law laid down in *How vs. Kirchner*, with the most earnest desire to correct our view of it, if we could discover it to be erroneous, we must say that, upon principle, it appears to us to be right, and that we are bound to abide by it.

NEGOCIABILITY OF BILL OF LADING.

PEASE V. GLOAGEC¹

40. A bill of lading for the delivery of goods to order and assigns, is a negotiable instrument, which by indorsement and delivery passes the property in the goods to the indorsee, subject only to the right of the unpaid vendor to stop them *in transitu*.

41. The vendor, however, may be deprived of this right,

¹ Admiralty, 1866 June 23, III Moore N. S. 556.

NEGOCIABILITY OF BILL OF LADING.

by the endorsement of the bill by the endorsee for valuable consideration, although the goods are not paid for; even if bills have been given which are certain to be dishonoured, provided the indorsee for value has acted *bonâ fide* and without notice.

THE "FREEDOM" ¹

42. The consignee of goods being at the same time endorsee of a bill of lading, is vested with all the rights of suit, and he is subject to the same liabilities in respect of such goods, as if the contract in the bill of lading had been made with himself. The right of suing upon a breach of contract, under a bill of lading, follows the property in the goods therein specified, that is, the legal title to the goods as against the indorsee.

HENDERSON V. THE COMPTOIR D'ESCOMPTE DE PARIS ²

43. A Bill of lading in which the words "or order or assigns" are omitted, is not a negotiable instrument.

**THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA
V. HENDERSON & AL. ³**

44. A bill of lading was endorsed and transferred in settlement of anterior claims to the appellants, under threats of immediate legal proceedings. The respondent was the original vendor of the goods, and it had been agreed that the buyer should remit him the proceeds of the sale of the goods described in the bill; but his claim was only in equity.

The Privy Council upheld the right of the appellants against the equity of the respondent, the consideration given for the endorsement of the bill was established, and the threats of legal proceeding were not illegal.

**SUBSTITUTION OF PARTIES IN CHARTER-PARTY. See CONTRACT:
*iisdem verbis.*****WHEN FREIGHT IS DUE.****CLEARY V. McANDREW. THE CARGO EX "GALAUS" ⁴**

45. The freight is due to the master of a vessel, when delay is occasioned in carrying the cargo to its destination, by reason of the arrest of the vessel by order of the Court of Admiralty, at the instance of a bond-holder; the master then

¹ Admiralty, 1871 Feb. 10, VIII Moore N. S., 29.

² Hong Kong, 1873 July 16, L. R. V P. C. 253.

³ Hong Kong, 1874 May 5, XXX Law Times 578.

⁴ Admiralty, 1863 July 27, II Moore N. S. 229.

WHEN FREIGHT IS DUE.

stands in the same situation as if he had been prevented by the default of the owner of the cargo from completing the voyage.

LORD KINGSDOWN, p. 229:—The rule of law is very clear, and was not disputed at the Bar—that a master of a vessel is entitled to recover his freight if he has either carried his cargo to its destination, or has been prevented from so carrying it by the act or default of the owner; and if by the occurrence of an accident on the voyage delay be occasioned, the master may claim a reasonable time to carry on the cargo, either in the same ship when repaired, or by transhipping it to another vessel.

BLACK V. ROSE¹

46. There was a clause in a charter-party providing, that freight should be paid at the rate therein specified, "the cargo to be taken alongside, and to be taken from the ship's tackle at the port of discharge, free of risk and expense to the ship." During the delivery of the cargo, the master required payment of the freight, for the amount of cargo delivered each day over the ship's side into the consignees' boats, and refused to deliver any more cargo, on the consignees refusing to pay on delivery as required.

The Judicial Committee maintained the master's pretensions, as on such delivery and receipt of the cargo, the master ceased to be responsible and to have any lien on the goods, he was justified in refusing to discharge the cargo without payment of the freight each day, on the quantity delivered, for his lien would be given up by delivery of the goods.

GAUDET V. BROWN. THE "ARGUS" AND THE "HEWSONS."²

47. The freight is earned by the carrier, at the arrival of the goods ready to be delivered to the consignee.

SIR MONTAGUE E. SMITH, p. 159.—The master, as a rule, is only bound to deliver cargo upon production of the bill of lading; and it is clear that freight may be earned before actual delivery, if the goods have been brought to the port of arrival ready to be delivered according to the bill of lading. The rule was stated in a judgment of the Court of Common Pleas, delivered by *Willes, J.*, in *Dakin v. Oxley*³ as follows: "The true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and according to the laws of *England*, as a rule, freight is earned by the

¹ *Island of Ceylon*, 1864 June 30, 11 Moore N. S. 277.

² Admiralty, 1873 May 30, L. R. V. P. C. 134.

³ 15 C. B. N. S. 664.

WHEN FREIGHT IS DUE.

carriage and arrival of the goods, ready to be delivered to the merchant.¹ Arrival, of course, means "at the destined port," as the next passage of the judgment explains.

AGENCY

See PRINCIPAL AND AGENT.

AGREEMENT

See CONTRACT.

ALLOWANCE

See ALIMENTARY ALLOWANCE, SEPARATION : *allowance to wife*.

ALIEN**LEGAL STATUS OF ALIENS IN FRANCE.**

DONEGANI V. DONEGANI¹

48. The civil status of aliens in France with regard to the right of succession was stated as follows :

SIR LANCELOT SHADWELL, p. 82. — If a foreigner died, having lands in France, his land would belong to the king, unless he had a child or other descendants born in France ; if he left several children, some born in France, others not, those who were born in France would exclude the king from taking ; and the consequence was, that as he was excluded, all the children would take in the same manner as if all had been born in France ; and if the foreigner left a son born out of France, who had children born in France, in that case the grand children would inherit to the grandfather to the exclusion of their father.

To support the above remarks, the following authorities were cited : *Denisart*, vol. II, tit. *Aubains*, p. 576, 572, 580 ; *Dictionnaire des Domaines*, p. 141 ; *Traité du Domaine*, Lefebvre, p. 127, note 6 ; *Poullain du Parc, Principes du Droit français*, liv. I, cap. 15, No 9.

See also PREROGATIVE OF THE CROWN, DROIT D'AUBAINE.

ALIMENTARY ALLOWANCE**CANNOT BE COMPENSATED.**

MUIR V. MUIR²

49. An alimentary allowance given in a will cannot be the subject of compensation, and this rule applies even where the donee of the allowance is an executor and trustee of the estate and is indebted to the estate.

50. Aliments given by law or by deed are *insaisissables* ; therefore a clause of a will declaring *aliments insaisissables* is legal.

¹ Lower Canada, 1835 Feb. 2, III. Knapp. 63.

² Quebec, 1873 Dec. 9, L. R. V. P. C. 60.

CANNOT BE COMPENSATED.

SIR JAMES W. COLVILLE, p. 83 :—The question on the first plea is, whether the claim of the plaintiff can, by the law of Canada, be the subject of compensation. The plaintiff's share in the revenue of the testator's residuary estate is beyond all doubt an alimentary allowance; and the authorities cited by Mr. Justice Badgley, and the 1190th article of the Civil Code, establish that a debt arising in respect of an alimentary allowance is generally incapable of being the subject of compensation. This has been admitted. That such a plea would be bad if the question had arisen between the trustees and one of the children indebted to the estate who was not a trustee, is, their Lordships apprehend, too clear for argument. It is however, contented that the fiduciary character of the plaintiff, and the duties imposed upon him by the will, take this case out of the particular rule. Sir Richard Baggallay relied, first, on the direction in the will that the trustees should reduce the residue into possession without delay. He did not go so far as to say that this clause made the realization of the whole residue a condition precedent to the distribution of the annual income of the residue. But he insisted that it expressly imposed upon the plaintiff, as trustee, the duty of bringing the debt which he owed into the common fund, and that his failure to do this suspended his right to receive share of the fund.

Another argument was founded on the English doctrine, that a debt due from an executor is assets in his hands. This doctrine, however, if it obtains in Lower Canada, where the functions and powers of an executor are by no means the same as those of an English executor, seems to their Lordships to have little application to the present case, in which, *ex concessis*, the debt continues to be outstanding, the larger portion of it being the subject of a special contract between the debtor and his co-trustees. In truth the argument for the appellants on this part of the case seems to resolve itself into this: that the plaintiff being a trustee and executor, his claim has lost the immunity from compensation which by the general law it would possess, by reason of the rule (assumed to exist in Lower Canada as in England) that a trustee or executor cannot take anything out of the estate whilst he continues to be indebted to it. But for this exception to the general rule of the law of Lower Canada, no authority has been adduced. That law does not recognize the distinction between law and equity which obtains here. It has now been reduced to a code. The articles of the code expressly state: first, that when two persons are mutually debtor and creditor of each other, both debts are as a general rule extinguished by compensation; and, secondly, that compensation does not take place in the case of a debt which has for object an alimentary provision not liable to seizure. The defendants by their plea invoke the first article, which is wide enough to embrace every case of set-off, whether legal or equitable. And their Lordships cannot see that, by any other article of this code, or otherwise, the Courts in Canada have power upon some supposed ground of equity to engraft an exception upon the exception established by the second article.

It is suggested in the appellants' factum filed in the Court of Queen's Bench, that the respondent, being a trustee, might, if his

CANNOT BE COMPENSATED.

argument be well founded, continue to receive his alimentary allowance, although he had misappropriated to a large extent the trust fund. It is not necessary to consider what would happen in such a case. It is sufficient to say that the debt by which it is now sought to compensate the alimentary provision, does not arise out of the misappropriation of trust moneys; but out of transactions with the testator in his lifetime.

Again, it is stated in the first plea that the presumable intention of the testator was only to exempt the alimentary provision made to his children, from transfer and assignment to strangers, and not to free it from any charge or lien which the executors might have on it for indebtedness to the estate. And arguments founded on this presumed intention have been used both in the Court of Queen's Bench and here at the bar. Their Lordships, however, concur with the learned judges of the Court of Queen's Bench in thinking that no grounds for imputing to the testator an intention to vary the general law as to alimentary provisions are to be found in his will. The scheme of his will is this: by the exercise of the testamentary power he suspended the vesting of the shares of his heirs in the corpus of his estate, or made them incapable of being divested; and so far deprived his children of that which the law would have given them if he had died intestate. As a compensation for this he gave them, until the period of final division should arrive, this alimentary provision, with the benefit of that protection which the law of Canada throws over such provisions. There are no words from which it can be inferred that he intended to diminish that protection. The fact that the respondent and others of his sons were indebted to him, or generally embarrassed when he made his will, or afterwards became so, tends, in their Lordships' opinion, rather to raise than to rebut the presumption that he meant this alimentary provision to be free from all claim to compensation; and to insure to them the means of support whilst they were kept out of their inheritance.

AMIABLES COMPOSITEURS

See ARBITRATOR.

ANNUITY**CONFUSION BY MARRIAGE.**

FITZGERALD V. FITZGERALD ¹

51. A man agreed to pay a woman an annuity for her life, payable half yearly, for her separate use, and free from anticipation. Afterwards that man married the annuitant, and died leaving her surviving. It was held that the annuity was not extinguished, but only suspended by the marriage, and that the widow had the right to recover

¹ New South Wales, 1868 June 16, V Moore N. S. 180.

CONFUSION BY MARRIAGE.

arrears accrued subsequent to the death of her husband from the latter's representatives out of the estate.

APPEAL.**APPEALABLE VALUE.**

CUVILLIER V. AYLWIN ¹

52. An act having been passed by the colonial Legislature of Lower Canada, limiting the right of appeal to causes where the sum in dispute was not less than £500 sterling, a petition for leave to appeal, in a cause where the sum was of less amount, could not be received by the king, in council, although there was a special saving in the colonial act of the rights and prerogatives of the Crown.

SIR JOHN LEACH, p. 78: — It is not necessary to hear counsel on the other side. The king has no power to deprive the subject of any of his rights; but the king, acting with the other branches of the Legislatures, or one of the branches of the Legislatures, has the power of depriving any of his subjects, in any of the countries under his dominion, of any of his rights. This petition must therefore be dismissed.

NATHOOBHOY RAMDASS V. MOOLJEE MADOWDASS. ²

53. In Bombay, the law allows an appeal from interlocutory judgments, but does not permit one from the finding of a jury in the court of equity.

In re SAMUEL CAMBRIDGE. ³

54. When there is an intermediate court of appeal, and the appealable value is under the amount fixed by the law of the colony, leave of appeal to the Privy Council was refused, but as the case was one of considerable hardship, the committee advised the allowance of the appeal by the intermediate court of appeal.

CAMILLERI V. FLERI. ⁴

55. In the Island of Malta appeals are allowed by law to the Privy Council, only from judgment for or in respect of any sum or matter at issue above the amount or value of £1,000 sterling, or where the judgment involves, directly or indirectly, any question respecting property, or any civil rights amounting to, or of the value of £1,000 sterling.

On special application leave to appeal was granted from a decree of the court below directing the children to be re-

¹ Lower Canada, 1832 Nov. 20, II Knapp 72.

² Bombay, 1840 Feb. 7, III Moore 87.

³ Prince Edward Island, 1841 Feb. 11, III Moore 175.

⁴ Malta, 1845 June 20, V Moore, 161.

APPEALABLE VALUE.

husband moved from the guardianship of their mother, civil rights being involved.

UBDOOLAH V. MOOTICHUND.¹

56. Two suits were brought for sums due on the same account, each of which was under £500; it was held that such suits could not be consolidated for the purpose of appeal, though the original severance of them was contrary to the plaintiff's instructions, and the amount of both together exceeding the appealable value. The court below had no right to consolidate such cases for the purpose of an appeal, even if they constituted one and the same cause.

PATNELLI V. HEDDLE.²

57. Leave to appeal was granted from an order of the Governor at Sierra Leone, refusing a new trial, although the amount of the matter at issue was under £400, the appealable value, on the ground that the court below had refused to hear counsel in support of the rule on the merits of the case and on the questions of law raised.

LINDO V. BARRETT.³

58. Although the subject in dispute was under the appealable value prescribed by the Royal Instructions regulating appeals from *Jamaica*, yet the Judicial Committee, in view of the public importance of the question at issue, allowed an appeal.

CASTRIGUE V. BUTTIGIEG.⁴

59. Their Lordships, under the circumstances of the case, granted leave to appeal, though the amount involved was less than the amount provided by the Order in Council, but they intimated that it was not to form a precedent for any other case where the amount at issue was under the required appealable value.

THE CHURCHWARDENS OF ST. GEORGE V. MAY.⁵

60. Leave of appeal was allowed by the Judicial Committee, the question being of importance and the sum involved uncertain in value.

¹ 1 Moore Indian appeal cases 363.

² Sierra Leone, 1852 July 7, VIII Moore 41.

³ Jamaica, 1856 Feb. 7, IX Moore 456.

⁴ Malta, 1855 Nov. 27, X Moore 103.

⁵ Jamaica, 1858 Dec. 1, XII Moore 282.

APPEALABLE VALUE.

BOSWELL V. KILBORN.¹

61. The appealable value fixed by statute in Lower Canada is above £500 sterling. In an action for non-performance of a contract a verdict was given for £600 currency, that is less than £500 sterling, and the court of appeal refused leave to appeal to England on the ground that the sum was under the appealable value.

Upon special petition to Her Majesty in Council, leave to appeal was granted, because interest ran with the judgment and that fact, by the law of Canada, would bring the subject-matter within the appealable value; and also because important questions of mercantile law were raised, and an action of a similar nature was still pending, the transaction being a continuing contract.

MUSSUMAT AMEENA KHATOOR V. RADHABENOD MISSER.²

62. In ascertaining the appealable value, the whole matter in dispute should be considered, and not only a fractional part of it.

ROGERS V. RAJENDRO.³

63. This was an action of damages, the amount granted by the court, at Calcutta, was under the appealable value prescribed by the charter of the court. But as an important point of law was involved, and special leave to appeal was, upon petition, granted.

GOOROOJERSAD KHOOND V. JUGGUTCHUNDER.⁴

64. The proper mode of estimating appealable value in appeal from the Sudder court, in Calcutta, is to add to the principal the interest given by the decree, as the question to be tried upon the appeal must be whether the decree is or is not right, that is to say whether the decree has or has not properly ordered the payment of the capital and interest.

THE QUEBEC ASSURANCE CO. V. ANDERSON.⁵

65. Leave of appeal was granted on the ground that the interests and costs granted by the court below exceeded the sum required by the statute for an appeal in England. But, upon petition by the respondent, showing that the calculation as to value was erroneous the appeal was dismissed.

¹ Lower Canada, 1859 Feb. 1, XII Moore 467.

² Calcutta, 1859 Feb. 1, XII Moore 470.

³ Calcutta, 1860 June 28, XIII Moore 209.

⁴ Calcutta, 1860 June 15, XIII Moore 472. The Judicial Committee gave a similar judgment in another Indian case, the same day. See XIII Moore 469.

⁵ Lower Canada, 1861 June 14, XIII Moore 477.

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66. A party applying *ex parte* and obtaining an order such as has been obtained in this case, takes it subject to the other side making application for its discharge.

MACFARLANE V. LECLAIRE.¹

67. The amount claimed by the action in this cause was less than £500.

In determining the question of the value of the subject matter in dispute, upon which the right of appeal depended, the proper course is to look at the judgment as to the extent that it affected the interest of the party prejudiced by it, and seeking to relieve himself from it by appeal. In this case, the appellant was a *tiers-saisi* whose declaration was contested, and upon the contestation he was found debtor to the extent of £1,642; now he wants to be relieved of this condemnation; the amount in dispute exceeds the appealable value, and he has a right to be heard.

Her Majesty in Council is not precluded from entertaining a petition to rescind leave to appeal on the ground of want of jurisdiction, by the fact that leave to appeal was granted by a colonial court, under the authority of a colonial statute, as the construction put by the colonial court upon that act can be reviewed by the Judicial Committee.

MARQUIS V. ALLAIRE.²

68. The amount mentioned in the declaration was under £500 sterling, but several other actions had been brought against the same party, founded on the same transaction, which would be practically decided by the judgment in this case.

Upon special application for leave to appeal, although the cause of action did not fall within the meaning of the saving clause of the statute: "other matters or things where the rights in future may be bound," still, under the circumstances, leave was granted, subject to a petition being presented by the respondent, upon the competency of the appeal, upon which it might be dismissed.

LORD CHELMSFORD, p. 192:—This petition for leave to appeal depends upon the same Act of the Province of Lower Canada as the case of *Macfarlane v. Leclaire* from the court of Queen's Bench at Montreal, which their Lordships have just disposed of (34 Geo. III. cap. 6), but the questions raised in the two cases are entirely different. Upon the present petition it is not denied that the matter

¹ Lower Canada, 1862 Feb. 8, XV Moore 181.

² Lower Canada, 1862 Feb. 10, XV Moore 189.

APPEALABLE VALUE.

in dispute is not of the value of £500 sterling, but the petitioner prays that he may have leave to appeal granted to him upon the special circumstances of his case. The sum actually recovered in the action against the petitioner is only £165 3s. 7d. with interest at $4\frac{1}{2}$ per cent., but he states that in consequence of his having been held to be liable to the plaintiff in that action as a member of an incorporated society, carrying on a banking business for a loan or deposit made by the plaintiff to or with the banking company, other depositors in the bank have brought numerous actions against him, by which he is sought to be rendered liable to claims amounting to upwards of £4,000. It was argued, but not very strongly pressed, that the existence of these actions following upon the judgment might possibly bring the case within the class of exceptions in the 30th section of the Act, and so entitle the petitioner to appeal, although the immediate sum or value in dispute is less than £500. It would be difficult, however, without straining the words of the Act to make the exceptions apply to the petitioner's case. But the petitioner contends, that although he is precluded from an appeal in consequence of the insufficient value of the matter in dispute, and is unable to bring himself within the exceptions, that it is still open to him to apply to Her Majesty in Council for leave to appeal, and that the peculiar circumstances of his case justify the application.

He maintains that the jurisdiction by way of appeal from all colonial courts is a prerogative of the Crown, which cannot be taken away except by the express words of an Act of the Legislature to which the Crown has given its assent; and that in the colonial Act in question, not only are there no words to take away the prerogative, but that it is expressly reserved by the 40th section, in which it is declared that nothing in the Act contained shall be construed in any manner to derogate from certain specified rights of the Crown, "or from any other right or prerogative of the Crown whatsoever." But here the petitioner is met by the case of *Cuwillier v. Aylwin* (2 Knapp. 72), in which the very point at which he raises was decided in the Privy Council against him. If the question is to be considered as concluded by this decision his petition must be at once dismissed; but upon turning to the report of the case, their Lordships are not satisfied that the subject received that full and deliberate consideration which the great importance of it demanded. The report of the judgment of the Master of the Rolls is contained in a few lines, and he does not appear to have directly adverted to the effect of the proviso contained in the 40th section of the Act on the prerogative of the Crown.

Their Lordships must not be considered as intimating any opinion whether this decision can be sustained or not, but they desire not to be precluded by it from a further consideration of the serious and important question which it involves. The petitioner must understand that the prayer of his petition will be granted, but at the risk of a petition being hereafter presented from the opposite party, upon which his appeal may be dismissed as incompetent.

Their Lordships will, therefore, humbly report to Her Majesty that leave ought to be granted to the petitioner to enter and prose-

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pute his appeal upon lodging a deposit of £300 in the registry of of the Privy Council as security for the costs of the respondent.

MUTUSAWNY PAGAVERA YETTAPA NAIKER V. VENTATASMARA.¹

69. Special leave to appeal granted, although the amount decreed was much under the appealable value, the subject matter at issue being in excess of it, and the original demand having been necessarily limited by the jurisdiction of the court where the suit originated.

DOORGA DOSS CHOWDRY V. RAMANAUTH CHOWDRY.²

70. Costs cannot be added to the principal sum recovered in estimating the appealable value.

KO KHINE V. SNAUDEN.³

71. Special leave to appeal was granted, although the amount involved in the action was under the appealable value. There was an important question of law raised, and eleven other actions brought involved the same question of law, and had been directed by an order of the court below to be heard upon the same evidence and concluded by the same judgment; and the aggregate amount involved in the actions was more than the appealable value.

BROWN V. McLAUGHAN.⁴

72. Special leave to appeal granted, although the amount involved was under the appealable value, on the ground that the question involved the construction of a colonial Act which affected the interest of a large class in the colony for which the Act was passed. In granting the special leave, the Judicial Committee limited the appeal to the construction of the colonial Act.

SAUVAGEAU V. GAUTHIER.⁵

73. The appealable value in Quebec is £500 sterling, or when the issue is concerning "titles to land or tenements, annual rents, or other matters in which the rights in future of parties may be affected."

74. An annual rent of \$11.28 was sold for \$456 payable in ten equal yearly instalments, and the land was hypothecated to secure the amount.

¹ Madras, 1865 Nov. 27, L. R. I P. C 1.

² Moore's Indian appeal cases 262.

³ Bengal, 1868 Feb. 8, V Moore, N. S. 67.

⁴ South Australia, 1870 Dec. 13, VII Moore N. S. 306.

⁵ Quebec, 1874 May 5, L. R. V. P. C. 494.

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In a suit to enforce payment of certain instalments, leave to appeal was granted by the court of appeal in the colony to the Privy Council, but their Lordships dismissed the appeal as not falling within the above description.

SIR JAMES W. COTVILLE, p. 497:—It is desirable to state shortly how this question arises. It appears that Martel was indebted to the insolvent Senécal in a certain sum of money, for which a rent charge had been commuted. That sum of money was payable by instalments, and it was also secured by hypothecation upon the land upon which the rent had originally been charged. The insolvent, a considerable time before his insolvency, assigned this, with other choses in action, to Louis Gauthier, the respondent, for value; but notice of the assignment was not given to Martel until Senécal was in insolvent circumstances. Louis Gauthier sued Martel, the original debtor, for certain instalments of that sum; the whole value of the particular debt so assigned being considerably below the appealable amount of £500. In that state of things the appellant, who was the general assignee of the insolvent estate of Senécal, intervened, and there remained no question as to the liability of the original debtor; but the simple question tried in the suit, and which is now brought before their Lordships on appeal, was whether the particular assignee could claim the sum sued for, or whether it had passed by the general assignment of the insolvent's effects to his general assignee. The solution of that question, of course, depended upon the further question, whether "signification" or notice was necessary to complete the title of the particular assignee, and whether that notice had been given in proper time.

A preliminary objection is now taken to the hearing of this appeal on the ground that it was not competent to the judges of the Court of Queen's Bench in Canada to allow such an appeal; and in support of that contention we are referred to article 1178 of the Canadian Code of Procedure, which limits the cases in which an appeal lies as of right to Her Majesty in Council from final judgments rendered in appeal or error by the Court of Queen's Bench. That article provides that such an appeal will lie, first, "where the matter in dispute relates to any fee of office, duty, rents, revenue, or any sum of money payable to Her Majesty; secondly, 'in cases concerning titles to lands or tenements, annual rents, or other matters in which the rights in future of parties may be affected; thirdly, 'in all other cases wherein the matter in dispute exceeds the sum or value of £500 sterling.'" It is clear that the case falls neither within the first nor the third of these clauses. The only clause within which it is sought to bring it is the second. But their Lordships are of opinion that it does not really fall even within that clause. It has been argued, that, inasmuch as the particular debt which was in question in this suit was payable by instalments, the title to it was a matter in which the rights in future of the parties might be affected. But their Lordships do not think that that is the true construction of the clause. The matter in question was the whole debt; and their Lordships think that the mere circumstance

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of the debt being payable by instalments would not make the case appealable to Her Majesty in Council if it were not otherwise appealable. It was further suggested the same question might arise in respect of the other assets comprised in the assignment to Gauthier, and the decision in this case would govern the rights of the parties as to all those assets. But their Lordships have not the means of knowing whether the title to those other choses in action would stand upon precisely the same ground as the title to that in question in this suit. Some of them may have been realised, and as to some of them notice may have been given long before the insolvency. Their Lordships cannot assume that the facts touching these other debts were before the judges in Canada; and, even if they were, their Lordships, considering the mode in which this litigation arose, in a suit brought by the particular assignee to realise a small sum as against one of those debtors, and not in a suit brought by the general assignee to impeach the whole transaction, are not satisfied that it was a case in which the Court of Queen's Bench would have had jurisdiction to allow the appeal. The power of the Court of Queen's Bench to allow an appeal is clearly limited by the Code; it has no power, upon special grounds not provided for by the Code, to grant special leave to appeal.

The question, therefore, is, what ought now to be done? Now their Lordships are of opinion that this case very much resembles the case of *Retemeyer v. Obermuller*, 2 Moore, P. C. Cases, decided as early as 1837, in which it appeared that the appeal had been irregularly allowed in the colony, the security not having been completed within the proper time. In that case, *Lord Brougham*, having stated that the irregularity was fatal to the appeal as it stood, said this: "The respondent has, however, appeared to the appeal here, and lodged his case. It is clear, therefore, that the appellant must have been led to suppose that any objection on the score of irregularity was waived; and though their Lordships are of opinion that the order made by the Court below, allowing the appeal, was, for want of the security being completed, irregular, and could not be cured by any waiver or implied consent on the part of the respondent, yet they think it would be a fit case to recommend the allowance of the appeal upon a petition presented for that purpose. The result will be that the case must stand over for such application." In that case it was held that the irregularity was fatal to the appeal as it stood; and the committee, though it thought that there might be ground for allowing a special appeal, directed the case to stand over in order that there should be an application for special leave to appeal. It also pointed out that the respondent, in allowing the case to be lodged, had induced the appellant to suppose that the objection on the score of irregularity was waived. And upon this last point their Lordships cannot but observe that the proper course, when such a question as this arises, is to come here by petition as early as possible, and before the cases are lodged, and the expense of preparing those cases is incurred, in order to bring the point before their Lordships, and to get the appeal dismissed. It is then open to their Lordships to recommend Her

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Majesty either to dismiss the appeal, in which case the parties are not put to the expense of preparing for the hearing; or to grant special leave to appeal. Their Lordships, if they were to dismiss this appeal upon the objection now taken for the first time, would be disposed to dismiss it without subjecting the appellant to the costs, which have been so unnecessarily incurred. On the other hand, they are not prepared to say that if a petition had been presented to them for special leave to appeal, there may not be circumstances in this case which would have induced them to recommend Her Majesty to grant such leave to appeal. They by no means invite such an application, but leave it for the consideration of the appellant whether he would prefer to have the appeal now dismissed without costs, or whether he would wish the case to stand over in order that he may present a petition for special leave to appeal upon such grounds as he thinks might induce their Lordships to recommend Her Majesty to give that leave.

BANK OF NEW SOUTH WALES V. OWNSTON.¹

75. Although costs may not be added to the amount recovered is estimating the appealable value, yet interest on a verdict, given by statute, payable from the time of obtaining such verdict until the time of entering up the judgment appealed from, and included in such judgment, is to be considered in estimating such appealable sum.

ALLAN V. PRATT.²

76. To determine whether there is an appeal or not, the judgment appealed from must be examined as far as it affects the interest of the appellant. The principles above stated in *Macfarlane v. Leclaire* were approved, and the same re-affirmed as follows by

THE EARL OF SELBORNE, p. 781:—The proper measure of value for determining the question of the right of appeal is, in the judgment of their Lordships, the amount which has been recovered by the plaintiff in the action and against which the appeal could be brought. Their Lordships, even if they were not bound by it, would agree in principle with the rule laid down in the judgment of this tribunal delivered by *Lord Chelmsford* in the case of *Macfarlane v. Leclaire*³, that is that the judgment is to be looked at as it affects the interests of the party, who is prejudiced by it, and who seeks to relieve himself from it by appeal. If there is to be a limit of value at all, that seems evidently the right principle on which to measure it. The person against whom the judgment is passed has either lost what he demanded as plaintiff or has been adjudged to pay something or to do something as defendant. It may be that the value to the defendant of an adverse judgment is greater than the value laid by

¹ South Wales, 1879 March 28, L. R., IV Appeal Cases 270.

² Quebec, 1888 July 26, L. R. XIII Appeal Cases 780.

³ XV Moore P. C. 181.

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the plaintiff in his claim. If so, which was the case in *Macfarlane v. Leclaire*, it would be very unjust that he should be bound, not by the value to himself, but by the value originally assigned to the subject matter of the action by his opponent. The present is the converse case. A man makes a claim for much larger damages than he is likely to recover. The injury to the defendant, if he is wrongly adjudged to pay damages, is measured by the amount of damages which he is adjudged to pay. That is not in the least enhanced to him by the fact that some greater sum had been claimed on the other side.

Therefore in principle their Lordships think the case is governed by *Macfarlane v. Leclaire*, upon the question of value, and they do not think it is at all affected by the circumstance that the Court below did not give effect to that objection, but gave leave to appeal. It has been decided in former cases that leave so given does not make the thing right, if it ought not to have been done.

Then it is submitted by the learned counsel that their Lordships ought to give an opportunity for an application to be made for special leave to appeal, on the ground that not only questions of fact but also, as bearing on those facts, questions of law, and particularly a question of law which may be important, upon article 1054 of the Civil Code, are involved in the case. Of course their Lordships will not at present go into the merits of the case at all, and they will assume that there may be such a question and that it may be important; but the present question is, whether, this appeal being incompetent, they ought to give, under the circumstances of the case, an opportunity of asking for special leave to appeal. No doubt there may be cases in which the importance of the general question of law involved may induce their Lordships to give leave to appeal, though the value of the matter in dispute is not sufficient; but their Lordships must be governed in the exercise of that discretion by a consideration of all the circumstances of each particular case. In this case they see, from the manner in which it comes before them, that this general question of law, if allowed to be argued on appeal, would be argued at the expense, if he did appear and go to any expense, of a man evidently too poor to undertake it. And, secondly, they see that there would be no probability whatever, if they permitted such an appeal, of their Lordships having the assistance which they must necessarily desire, whenever an important question as to the construction of an article of the Civil Code, having so large a bearing as this is suggested to have, may require to be considered and determined by them. If in any future case a similar question should arise, and should be competently brought before their Lordships, no doubt it will be decided upon its merits and not held to be finally concluded by the judgment given in this particular action. Their Lordships do not think it would be at all a satisfactory thing to allow an appeal not otherwise competent for the sake of raising in those circumstances and in that manner a question of the importance which this question is said to have. Therefore the appeal will be dismissed, but, as nobody has appeared to oppose it, there will be no costs.

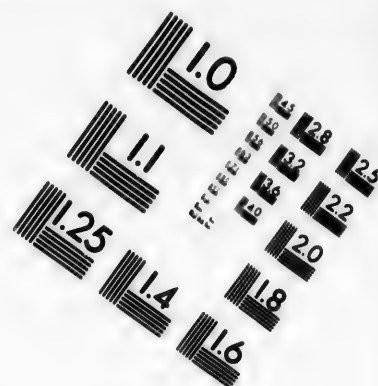
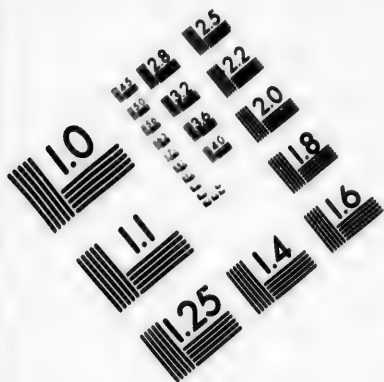
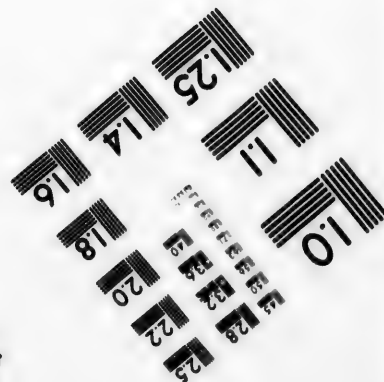
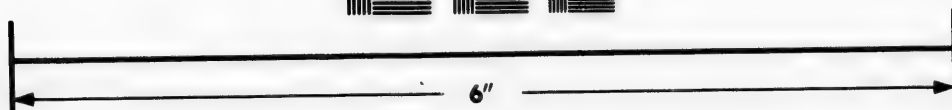
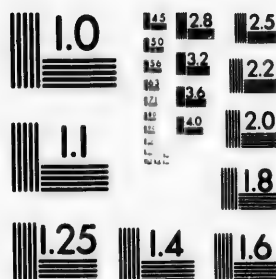


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CONSOLIDATION OF APPEALS.

HIDDINGH V. DENYSSEN ¹

77. Their Lordships will consolidate appeals at any stage, if it appears convenient that they should be heard together. An appeal was struck out of the board and ordered to be consolidated with two other appeals arising out of the same will, but in a suit which had not been instituted till a year after the first appeal had been admitted.

CROSS APPEALS.

NOURA NARAINS RAO V. HUSSEK PUNT BHAW ²

78. A cross appeal was allowed from part of a decree of the *Sudder* Court in the North Western Provinces, although the Respondents had not applied in *India* for leave to appeal within the proper time; the Respondents being mistaken in the practice of the Judicial Committee upon a cross appeal.

This cross appeal was ordered to be prosecuted and heard at the same time as the principal appeal upon one printed case. In the event of the principal appeal being dismissed for want of prosecution, liberty was reserved to the respondents to prosecute the cross appeal as a separate appeal.

DISMISSAL FOR NON-PROSECUTION.

LINDO V. THE KING ³

79. After a delay of six years the Judicial Committee refused to grant leave to prosecute an appeal, and dismissed it for non prosecution, although the delay arose from circumstances over which the appellant swore that he had no control. Their Lordships held the delay was unreasonable; it was quite impossible to grant the motion.

McKELLAR V. WALLACE & AL. ⁴

80. Leave to appeal on an *ex parte* application was, under special circumstances, granted upon terms of the appellant prosecuting the appeal and giving security for £500. No security having been given and nothing having been done within twelve months to prosecute the appeal, the Respondents, on being served with the order admitting the appeal, filed a counter petition to revoke the leave granted.

The Judicial Committee, under the circumstances, there having been great delay, made a peremptory order putting the appellant upon terms of lodging his petition of appeal

¹ Good Hope, 1886 Nov. 20, L. R. XII Appeal Cases 107.

² North Western Provinces, 1886 Nov. 29, XI Moore 36.

³ Sierra Leone, 1836 May 30, I Moore 3.

⁴ Calcutta, 1853 June 20, VIII Moore 378.

DISMISSAL FOR NON-PROSECUTION.

withing six weeks, or the appeal to stand dismissed, and enlarged the amount of the recognizance to £1,000, to cover the expenses occasioned by the proceedings in the Master's office, reserving the costs of the application to revoke the leave to appeal, to the hearing.

SMITH V. CRESSWELL ¹

81. The appellant had obtained leave from the court below to appeal to the Privy Council, but took no steps to procure a transcript of the record to be sent and lodged at the Privy Council office for three years, or any other step.

On respondent's petition the appeal was dismissed with costs.

FALSE OR INCOMPETENT.

EAST INDIA CO. V. ALBY ²

82. Where the court below has granted leave to appeal, in a case in which they were not authorized by their charter to do so, it is not sufficient for the appellant to present the common petition of appeal to the King in Council. A special application for leave to appeal must be made to the King in Council under such circumstances.

Ex parte AMES ³

83. Leave was granted on an *ex parte* application to appeal from a criminal proceeding, in Jersey, rescinded on special application of the Attorney General of the Island, the court being of opinion that the original leave ought not to have been given.

SHIRE V. SHIRE ⁴

84. If an appeal is incompetent, the Respondent should move on petition to dismiss the same on such ground, and not wait till the hearing to object to its competency.

TRONSON V. DENT ⁵

85. Same decision where there are fatal objections to the right of appeal.

WILSON V. CALLENDER. ⁶

86. In appeals from Barbadoes to the Queen in Council, the right of appeal is limited to cases in which the subject matter involves amounts to £300.

¹ Island of St-Vincent, 1864 June 27, X Law Times N. S. 672.

² Madras, 1820 May 22, 1 Knapp. 331 note.

³ Jersey, 1841 May 14, III Moore 413.

⁴ Mauritius, 1845 June 13, V Moore 81.

⁵ Hong Kong, 1853 June 22, VIII Moore 620.

⁶ Island of Barbadoes, 1855 July 20, IX Moore, 100.

FALSE OR INCOMPETENT APPEALS.

The court at Barbadoes held, that certain accounts and documents sought to be recovered in an action of detainee, were of no value in themselves, and refused leave to appeal against a judgment of nonsuit in the action. On the plaintiff's allegation that the value of the accounts and securities exceeded £300, their Lordships granted special leave to appeal. When the appeal came on for hearing, it appeared that the allegation as to the value of the accounts and documents was unfounded in fact, and unsupported by evidence, upon which their Lordships stopped the case, and dismissed the appeal with costs.

THE RIGHT HON. P. PEMBERTON LEIGH, p. 102 : — We shall dispose of this appeal upon a ground which we hope will in future prevent parties making *ex parte* applications, such as this, for leave to appeal, when, in truth, no ground exists to warrant such application.....

When parties make an application for an indulgence, and obtain that indulgence upon grounds which turn out not only to be unfounded, but absolutely untrue, they shall have known that their appeal will be dismissed with costs.

SIBUARAIN GHOSE V. HULLODHIN DOSS¹

87. When leave to appeal has been obtained *ex parte*, the respondent may, as a matter of course, present a counter-petition to dismiss.

88. Where an appeal had been so granted *ex parte* upon an allegation unfounded in fact, the Judicial Committee refused to hear the case, and dismissed the appeal with costs.

THE LORD JUSTICE TURNER, p. 356 : — We consider it a matter of the utmost importance that parties who come here for an indulgence upon an *ex parte* application, should take care and speak the truth. In this case, the appellant in his petition for leave to appeal, has erroneously alleged as a ground for the indulgence of the Court, a fact to which the judges in the Court below certify the contrary. Their Lordships are fully satisfied that this is so, and, that this case may operate as a warning in future, they dismiss the appeal with costs.

CREMIDI V. PARKER²

89. Objections to a false or incompetent appeal must be made at the time of the presentation of the petition for leave to appeal, when notice of the application is previously given to the respondent.

THE RIGHT HON. P. PEMBERTON LEIGH, p. 85 : — Applications for leave to appeal are generally made *ex parte*, and if it subsequently

¹ Calcutta, 1854 Nov. 30, IV Moore 354.

² Admiralty, 1857 March 2, XI Moore 83.

FALSE OR INCOMPETENT APPEALS.

appears that there has been a *mala fides*, upon a counter petition by the respondent to dismiss, the order allowing leave to appeal is discharged. That is the practice of this Court, but that is not the course adopted here, for the claimant gave notice to the captors, who had every opportunity of resisting the application, which they did.

LYALL V. JARDINE ¹

90. The petition for special leave to appeal must fully and truly state all circumstances which possibly can have any bearing on the favour asked for.

LORD CAIRNS, p. 126:— Nothing can be more important than that it should be understood that those who come before this committee upon an *ex parte* application for leave to appeal, should consider it their absolute duty to state, in the fullest and frankest way, every circumstance connected with the history of the case, which possibly can have any bearing on the leave for which they ask. Now, their Lordships do not mean to attribute, either to the appellant or to his advisers, any intentional disregard of this duty, or any wish in the petition which they presented in the year 1868, to suppress any fact which they might have thought material; but unfortunately, the petition is one which, when looked at, cannot be described otherwise than as a petition which was calculated to mislead the tribunal before whom it was heard.

MUSSEURIE BANK V. RAYNOR ²

91. Leave to appeal granted on special application by the Privy Council, may be rescinded with costs, if it contains any misstatement or any concealment of facts which ought to be disclosed.

SIR ARTHUR HOBHOUSE, p. 328:— At the same time their Lordships desire it to be distinctly understood that an order in Council granting leave to appeal is liable, at any time, to be rescinded with costs, if it appears that the petition upon which the order was granted contains any misstatement, or any concealment of facts which ought to be disclosed.

CANADA CENTRAL RAILWAY CO. V. MURRAY ³

92. Rules to be followed in special applications for leave to appeal were laid down as follows by:

LORD WATSON, p. 575:— Their Lordships are also desirous in this case to lay down the rule, that they will in future expect parties who are petitioning for leave to bring an appeal before this Board, to state succinctly, but fully, in their petition, the grounds upon which they make that demand. They certainly expect that parties

¹ Hong Kong, 1870 July 8, VII Moore N. S. 116.

² Allahabad, 1882 March 21, L. R. VII Appeal Cases 321.

³ S. C. Canada, 1883 June 30, L. R. VIII Appeal Cases 575.

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will confine themselves in future to the petition, and will not wander into extraneous matter, such as the record and proceedings over which this Board, until an appeal is permitted and the papers are sent to England by the proper authorities, have no control, and which they cannot accept on an *ex parte* statement, which an application of this kind is.

BAUDAINS V. LIQUIDATORS OF JERSEY BANKING CO. ¹

93. Where an order granting special leave to appeal had been made upon a petition which improperly concealed from their Lordships the ground upon which the appeal had been refused by the court below, a subsequent petition that further evidence be taken must be refused, as nothing will be done to assist an appeal so instituted. *See Sibnarraïn Ghose v. Hullothur Doss*, v. APPEAL: *special application for leave to appeal*.

CORPORATION OF ST. JOHN V. CENTRAL VERMONT RY CO. ²

94. When a party obtains leave of appeal on a certain important question of law, he will not be permitted, at the hearing on the merits of the appeal, to argue that the appeal turns on a question of fact.

LORD WATSON, p. 594:—Her Majesty, in accordance with the advice of this Board, was pleased, by Order-in-Council dated the 17th December 1887, to allow the present appellants to enter and prosecute an appeal against the judgment of the Supreme Court. In the petition for spec. leave, which is recited in the order, the appellants set forth correctly the grounds upon which the learned Chief Justice, and the judges who concurred with him, decided in favour of the present respondent, and then submitted, "that if the judgment of the Supreme Court, contrary to the view of both Courts in the province and to that of the two French judges in the Supreme Court, is correct, the power of taxation of the municipalities in the province of Quebec is greatly limited, and that whether it is by law so limited is a question of great and general importance."

Their Lordships would not have made any reference to these initial proceedings, had it not been that, at the hearing of the appeal, their time was chiefly occupied by an endeavour on the part of the appellant Corporation to argue that, as matter of fact, they had not, in any of the yearly rolls upon which these assessments were made, valued aught beyond the land occupied by the railway, and that they did not desire to include, and had not included, the bridge or other superstructures in the estimate. Their Lordships purposely abstain from laying down any rule as to the points which an appellant may competently raise under an appeal by

¹ Jersey, 1888 July 7, L. R. XIII Appeal Cases 832.

² S. C. Canada, 1889 July 25, L. R. XIV Appeal Cases 590.

FALSE OR INCOMPETENT APPEALS.

leave from the Supreme Court of Canada. That must depend upon the special circumstances of each case. But it must be understood that parties who get such leave upon the distinct representations that they desire to raise a particular question of law of great and general importance, cannot be permitted, at the hearing of the appeal, to change front and say that no such question arises, and to argue that the case turns upon a question of fact which the Supreme Court has wrongly assumed or decided. If the appellant corporation, in petitioning for the exercise of Her Majesty's prerogative, had stated the same case which they attempted to present in argument, it is almost matter of certainty that leave to appeal would have been refused.

Upon the construction of the Municipal Acts, their Lordships entirely concur in the view taken by the Chief Justice Ritchie, Section 323 of the General Act imposes upon the valuers appointed by the Council the duty of making a valuation of the "taxable property of the municipality"; and by the terms of Section 326 no part of a railway is made taxable property, except the land, as land, occupied by the road. In their Lordships' opinion the enactment of Section 327, to the effect that, when the company make no return, the valuation of all their immovable property shall be made in the same manner as that of any other ratepayer, refers to their immovable property already declared to be taxable, and simply amounts to a direction that the value of such taxable estate shall be estimated by the town's valuers instead of the company itself.

FROM INTERLOCUTORY JUDGMENTS.**NAHON V. PARIENTE¹**

95. When the leave of appeal is limited to judgments of a definitive character, an appeal upon interlocutory matter will not be received.

96. The charter of justice granted to the town of Gibraltar gives a right of appeal to the king in council against any final judgment, decree, or sentence of the court below; or against any rule or order having the effect of a final or definitive sentence. In a subsequent part of the charter, there was a reservation to the king in council, to allow an appeal upon the petition of any person aggrieved by any judgment or determination of the court below.

Their Lordships, however, were of opinion, that the latter clause in the charter did not reserve to the king in council, the power of admitting appeals from judgments of a different nature from those mentioned in the first clause.

BELSON V. BELSON²

97. Appeal allowed from a provisional order of the Royal court of Jersey, directing the infant children of the parties,

¹ Gibraltar, 1832 Nov. 24, 2 Knapp 66.

² Jersey, 1850 Feb. 22, VII Moore 30.

FROM INTERLOCUTORY JUDGMENTS.

to be left provisionally in the custody of the mother pending a suit for a separation.

LORD BROUGHAM, p. 34 : — The sole question is, whether we should admit an appeal from an Interlocutory Order. Is not this a definitive sentence *quoad* the custody of the children? We think it is, as the ultimate decision in the suit cannot affect that custody.

JONES V. GOUGH & AL.¹

98. An appellant is not bound to appeal from an interlocutory judgment, although by doing so he might have raised the whole question. He has the right to reserve the question upon his appeal from the final judgment.

Cameron v. Fraser, 4 Moore 1; *The Queen v. Belcher*, 6 Moore 471; *Williams v. The Bishop of Salisbury*, 2 Moore N. S. 377, 391.

LAMBKIN V. THE SOUTH EASTERN RAILWAY COMPANY²

99. The Privy Council will grant an appeal from a judgment setting aside the verdict of a special jury and ordering a new trial; such judgment does not belong to that class of interlocutory judgments from which no appeal is allowed from the court of appeal to the Judicial Committee.

A deposit of £300 as security for costs was ordered.

GOLDRING V. LA BANQUE D'HOCHELAGA³

100. The court of Queen's Bench cannot grant leave to appeal to the Judicial Committee of Her Majesty from an interlocutory order.

101. A judgment of the court of Queen's Bench confirming a judgment of the Superior court, which rejected a petition to quash a writ of *Capias ad respondendum* is not a final judgment within article 1178 Code of Civil Procedure.

SIR JAMES W. COLVILLE, p. 372 : — The article 1178 of the Code of Procedure is precise that an appeal lies to Her Majesty in her Privy Council from final judgments rendered in appeal or error by the Court of Queen's Bench. Then it gives the cases in which the appeal is allowed. There is no express provision for the allowance of such an appeal from an interlocutory order. The argument in support of the order of the court has proceeded chiefly upon sect. 822 of the same code, which is one of those which relate to procedure in respect of writs of *capias*. That article appears to their Lordships clearly to imply that the decisions to which it relates are no more than interlocutory orders. If the decision of the Superior

¹ *Canterbury*, 1865 Feb. 2, III Moore N. S. 1

² *Quebec*, 1877 Dec. 12, L. R. 5 Appeal Cases 352.

³ *Quebec*, 1880 Feb. 7, L. R. V. Appeal Cases 371.

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Court on the matter therein referred to had been regarded as a final judgment, there would have been no necessity to give by this article special leave to appeal, because it would have been appealable under article 1115, as pointed out by Mr. Digby. The real object of the article is to make special provision for an appeal to the Court of Queen's Bench from an interlocutory order of a particular kind. The Code gives by article 1116 an appeal against certain other interlocutory judgments, but in these cases article 1119 provides that there must be a preliminary motion before the Appellate Court, in order that the Court may decide whether the particular judgment falls properly within the terms of article 1116. But an appeal from an interlocutory judgment under article 822 was not to be subject to that provision, and hence the necessity for that article.

The judgment of the Court of Queen's Bench upon a judgment of the Superior Court in this matter cannot be regarded as a final judgment within the meaning of article 1178, unless it can be shewn that proceedings under the provisions of article 796, and the subsequent articles of the code which relate to the particular subject of *capias*, are so severed from the general suit that they are to be treated as something separate in their nature, and not as incident to the suit. Their Lordships are of opinion that the Code has not expressed that they are to be so treated, and that from their nature they are merely incidental to the suit and in the nature of process therein. They are, therefore, of opinion that the judgment of the Queen's Bench, which is the subject of the appeal, is not a final judgment within the meaning of the Code, and consequently that the appeal has not been regularly brought before Her Majesty in Council.

It has been suggested that their Lordships may now recommend Her Majesty to grant, as they have unquestionably power to do, special leave to appeal; but they are of opinion that there are not before them sufficient grounds for making such a recommendation.

ESNOUF V. ATTORNEY GENERAL FOR JERSEY¹

102. An order of court ordering a defendant, in a criminal libel suit, to plead, and after the defendant had pleaded "not guilty" ordering that he should be tried before the judges without a jury, is not a definitive sentence, but an interlocutory order only, and no appeal lies from such an order.

FROM COURTS OF FIRST INSTANCE.**HARRISON V. SCOTT²**

103. According to the clear meaning of the Legislature in passing 7 and 8th Vict., ch. 69, where there are questions of law raised by the proceedings in the inferior courts, in the

¹ Jersey, 1883 March 3, L. R. VIII Appeal Cases 304.

² Jamaica, 1846 May 19, V Moore 357.

FROM COURTS OF FIRST INSTANCE.

colonies, the Judicial Committee will favor an application for leave to appeal, direct to the Queen in Council, without resorting to the intermediate court of appeal of the colony.

FROM THE SUPREME COURT OF CANADA. See **APPEAL: special application.**

FROM THE SUPERIOR COURT TO THE COURT OF QUEEN'S BENCH.

BOSTON V. LELIÈVRE ¹

104. No appeal lies in a case of *Certiorari* from the Superior court to the court of Queen's Bench, in appeal, in Lower Canada.

MAYOR & ALDERMEN OF THE CITY OF MONTREAL V. BROWN ²

105. There is an appeal to the court of Queen's Bench from a final judgment rendered by the Superior court, in special proceedings commenced by petition for the removal from office of a Commissioner in expropriation, although no appeal is given by the statute.

SIR HENRY KEATING, p. 184: — It must be borne in mind that the rule of law in this country that an appeal does not lie unless given by express legislative enactment, does not prevail in French or Canadian law, where the presumption is in favour of the existence of what one of the judges of the Queen's Bench, in Canada, terms the "sacred right of appeal."

IN CRIMINAL CASES.

THE QUEEN V. EDULJEE BYRAMJEE ³

106. No appeal in cases of felony lies to the Privy Council from any of the colonial courts.

THE RIGHT HON. DR. LUSHINGTON, p. 289: — It is not unimportant to remember, that not only in *England*, but throughout the dominions of the Crown of *Great Britain*, governed by the law of *England*, no right of appeal in felonies has ever existed. Nor are we aware that in any one single instance the Crown has ever, by the exercise of its prerogative, granted leave to appeal in any such case..... Where persons charged with the commission of felonies have been convicted, it is natural that they should resort to every possible means to escape from the penalty of the law, or to put off to the latest moment the execution of the sentence. Consequently, it is to be expected, that applications in almost every case for leave to appeal, (supposing by the appeal is meant a new trial, or an entire rehearing), would be made to the Supreme Court. As that Court is sitting upon the spot, no great delay or mischief might follow from

¹ Quebec, 1870 Jan. 25, Moore N. S. 427.

² Quebec, 1876 Nov. 11, L. R. II Appeal Cases 168.

³ Bombay, 1846 April 8, V Moore 276.

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the postponement of the execution of the sentence, till that application was heard and disposed of. But if the Crown has really, by this Charter, reserved to itself the right of granting an appeal in such cases, what are the inevitable consequences? To cause execution to be done, would be, in effect, to prevent the right of granting an appeal vested in the Crown, and to take away from the prisoner convicted, the right of laying his case before his sovereign, and of obtaining a re-consideration of it. For it must be remembered, that if a re-consideration, by way of appeal, be reserved to the Crown, the right of applying for it must be reserved also. But if this were really the state of the law, we doubt whether any Court or any authority, would think itself justified in ordering execution to be done, till there has been an opportunity given to the prisoner, of applying to the Crown, for a re-consideration of the case, according to the right reserved to the Crown, and the prisoner. Many very evil consequences must necessarily follow from this state of things. A long period must elapse before an application to the Crown could be made, and its decision could be known. And eventually, where the leave to appeal was refused (and it must be presumed, that this would generally be the case), execution would follow the sentence, after so long an interval, that all benefit to be expected from a public example would be lost; and to this it may be added, that in a great majority of cases, the convicts themselves would be kept in a state of miserable suspense, to suffer in the end the same ignominious death to which they were sentenced.

THE QUEEN V. JOYKISSEN MOOKERJEE¹

107. On an application for leave to appeal from the sentence of the *Seuder Nizamut Adawlut*², the Judicial Committee, although of opinion that justice had not been done in the court below, declined to admit an appeal, on the ground that such course might be detrimental to the general administration of criminal justice in Her Majesty's Colonial and Foreign possessions; but suggested an application by the petitioner to the executive authorities for relief, with an intimation of their Lordship's opinion of the hardship and injustice of the particular case.

DR. LUSHINGTON, p. 295: — Now, with reference to the existence of the prerogative of the Crown, their Lordships are desirous that no expression should fall from them which in the slightest degree would throw doubt on the existence of that prerogative, not only under the existing circumstances, but in others which might arise with reference to the others dominions of the Queen, which may have been acquired by conquest. They do not think it necessary that they should, on the present occasion, enter minutely into the considerations upon which the prerogative of the Crown is founded.

¹ Bengal, 1862 July 16, 1 Moore N. S. 272.

² The chief native criminal court of appeal in Bengal.

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They think it will suffice for the purpose of this case, to assume that it does exist, and, consequently, that it is in the power of the Judicial Committee of the Privy Council, exercising that prerogative right under the Crown, so to advise Her Majesty, if they should think an appeal ought to be allowed on the present occasion.

With regard to the merits of the case itself, their Lordships certainly are inclined to come to the conclusion that justice has not been very well administered in the present case; and, supposing it to have been a civil, and not a criminal case, they would have had no hesitation whatever in recommending to Her Majesty to allow an appeal for the purpose of considering these proceedings, and of doing justice to the party complaining.

But this is a criminal case, and subject to very different considerations, admitting, therefore, two things—admitting the existence of the prerogative of the Crown, and admitting that this, *prima facie* and presumptively, is a case of great grievance,—their Lordships have now to determine whether, looking to all the circumstances attending the granting of appeals in criminal cases, it would be their duty to advise Her Majesty to grant their appeal or to withhold it.

We must recollect, in the first place that by granting an appeal is meant an examination of the whole of the proceedings which have taken place. It is not simply for the investigation of any legal question which might have arisen; it is for the purpose of examining the whole of the evidence, and the whole course of the proceedings upon the trial, to enable us to come to a conclusion upon the merits.

Now, it is of no small importance to bear in mind that, notwithstanding the numberless instances in which an application of this kind might have been made to the Queen in Council from all the various dominions subjects to Her Majesty, from all those parts of Her dominions that were acquired by conquest, and where Her Majesty has the entire sovereign power of legislating, according as she may think fit, either by orders in Council, or, as was determined on a former occasion, by virtue of Letters from the Secretary of State, it is, I say, to be borne in mind that, in no instance whatever, of any grievance however great, at any time, has any attempt ever been made to apply to Her Majesty for leave to appeal in a criminal case.

We can easily call to memory very many instances which have occurred in the Colonies in which it has been alleged that gross injustice has been done, and even lives sacrificed where they ought not to have been exposed to any danger; but no precedent of an appeal of this nature has existed; and we think it is obvious, upon the least consideration of the consequences, how it is that no such precedent has existed, and how it is that no such precedent would have been created, even if an attempt had been made to call into force the power of the Crown. It may be true that on some occasions it is not very desirable to argue simply from consequences alone; but the consequences of granting an appeal in cases of this description are so exceedingly strong, they are so entirely destruc-

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tive of the administration of all criminal jurisprudence, that we cannot for a single moment doubt that they are of the greatest importance in guiding us to form a judgment.

Now, if we were to advise Her Majesty to grant an appeal on this petition, how would the case stand? It is simply the case of an individual having been convicted of causing documents to be forged. Would not the same right apply to capital cases? What would be done in a capital case? Is there any distinction which can be drawn? If the prerogative of Her Majesty gives this individual the right of appeal, could any rules or regulations be imposed whereby the right of appeal could be governed, or could be restricted? So you would go through the whole catalogue of cases, and there is no doubt whatever that whenever punishment was likely to ensue, there would follow an appeal to Her Majesty in Council, and consequently not only would the course of justice be waived, but in very many instances it would be entirely prostrated.

These are the reasons which operate upon our minds in rejecting this application; not at all forgetting that injustice may have been done in this individual case, and not at all forgetting that the power of the Crown may be invoked in another shape, and that injustice may be remedied.

THE FALKLAND ISLANDS COMPANY V. THE QUEEN¹

108. Their Lordships entirely assented to the principles of above cause of *The Queen v. Joykissen Mookerjee*, to wit, that the Crown has authority, by virtue of its prerogative, to review the decisions of all colonial courts, whether the proceedings be of a civil or criminal character, unless it has parted with such authority; but the inconvenience and inexpediency of entertaining appeals in criminal cases is so great, and the consequences so entirely destructive of the administration of criminal justice in the colonies, that the Judicial Committee are very reluctant to admit an application for such an appeal.

109. Where, however, the proceedings were in substance rather of a civil character, under a form of criminal law, being an order in the nature of a summary conviction for penalties for killing animals *feræ naturæ*; and involved a question of law and property, namely, the right of the *Falkland Islands Company* to hunt and take wild cattle upon certain grazing stations and the lands attached thereto, and the Ordinance under which the conviction was made gave no appeal; the Judicial Committee, in the special circumstances of the case, and by analogy to the proceeding by *Certiorari* in England, advised Her Majesty to admit an appeal from such order, or conviction, on the understanding that the question of title

¹ Falkland Islands, 1863 June 13, 1 Moore N. S. 299.

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and right should appear upon the face of the record, which was ordered and brought up.

REG. V. BERTRAND ¹

110. The Judicial Committee, although approving the principles of the above cases, granted leave of appeal in this cause, the grounds of which are explained as follows :

SIR JOHN T. COLERIDGE, p. 473:— Upon principle, and reference to the decisions of this committee, it seems undeniable that in all cases, criminal as well as civil, arising in places from which an appeal would lie, and where, either by the terms of a charter or statute, the authority has not been parted with, it is the inherent prerogative right, and, on all proper occasions, the duty of the Queen in Council to exercise an appellate jurisdiction, with a view not only to ensure, so far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally. The interest of the Crown, duly considered, is at least as great in this respects in criminal as in civil cases; but the exercise of this prerogative is to be regulated by a consideration of circumstances and consequences; and interference by Her Majesty in Council in criminal cases is likely, in so many instances, to lead to mischief and inconvenience, that in them the Crown will be very slow to entertain an appeal by its officers on behalf of itself or by individuals. The instances of such appeals being entertained are, therefore, very rare.

The opinions stated by this committee in the following cases: *Ames et al.*, III Moore's P. C. cases 404; *The Queen v. Joykissen Mookerjer*, I Moore's P. C. cases, N. S., 272; *The Falkland Islands Co. v. The Queen*, I Moore's P. C. cases, N. S. 2996, establish this position.

The result is that any application to be allowed to appeal in a criminal case comes to this committee laboring under a great preliminary difficulty—a difficulty not always overcome by the mere suggestion of hardship in the circumstances of the case; yet the difficulty is not invincible. It is not necessary, and perhaps it would not be wise, to attempt to point out all the grounds which may be available for the purpose; but it may safely be said, that when the suggestions, if true, raise questions of great and general importance, and likely to occur often, and also where, if true, they show the due and orderly administration of the law interrupted, or diverted into a new course, which might create a precedent for the future; and also where there is no other means of preventing these consequences, then it will be proper for this committee to entertain an appeal, if referred to it for its decision.

LEVIEN V. THE QUEEN ²

111. The appellant had obtained leave to appeal from a conviction of a colonial court for a misdemeanour, subject to the question of the jurisdiction of Her Majesty to admit such

¹ New South Wales, 1867 July 10, IV Moore N. S. 463.

² Jamaica, 1867 July 8, IV Moore N. S. 483.

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appeal. At the opening of the case, it appeared that since such qualified leave had been granted, the prisoner had obtained a free pardon and been discharged from prison.

The Judicial Committee declined to enter upon the merits of the case, or to pronounce an opinion upon the legal objections to the conviction, and dismissed the appeal without costs.

REGINA V. MURPHY ¹

112. Special leave to appeal was granted to the Attorney General of *New South Wales* from an order of the Superior court in that colony, whereby a verdict of guilty for murder obtained by the Crown was set aside, and a new trial granted.

This order was set aside by judicial committee the 22nd June 1869. See VI *Moore*, N. S. 177.

RIEL V. THE QUEEN ²

113. Leave to appeal was refused in this case, where the appellant had been convicted of felony. During the appeal the following remarks were made by their Lordships:

The *Lord Chancellor* said he had expected to have heard something upon the question as to whether there was any appeal in a criminal case. Was there any authority for that?

Mr. Bigham cited the case of *Attorney General for New South Wales v. Bertrand* (1 *Privy Council Appeals*, p. 520).

The *Lord Chancellor* pointed out that that case turned upon the provisions of a particular statute giving in express terms an appeal.

Lord Monkswell said that their Lordships had stated on one or two occasions that they had jurisdiction to entertain a criminal appeal; but, as a rule, they never did, except under very special circumstances, and then they never went into the merits and reversed the judgment below upon the merits.

Lord Hobhouse said that whenever an appeal had been allowed it had been upon the ground that justice had not been done owing to some error in procedure.

Lord Monkswell said that if the petitioner had been tried without a jury at all that would have been a ground for appeal, but if the Privy Council sat as a court of criminal appeal from the colonies it would have to be multiplied tenfold. Every man convicted of any crime or sentenced to death in any colony would appeal as a matter of course, and be respited till the appeal was heard.

The Attorney-General pointed out that an appeal had been entertained from Canada in the case of *The Queen v. Coote* (L. R. 4 *Privy Council*, p. 599), but the case did not apply to the Northwest Territory.

¹ New South Wales, 1868 Feb. 6, V *Moore* N. S. 47.

² Manitoba, 1885 Oct. 22, L. R. Appeal Cases 675.

IN CRIMINAL CASES.

Mr. Bigham said that in *Bertrand's case* it was laid down that it was the inherent prerogative right of the Privy Council to exercise an appellate jurisdiction.

The *Lord Chancellor* said the only question was whether Her Majesty had parted with the power. She might have parted with it by giving an absolute and final court, and, therefore, delegating her power to that court, or by express words have reserved the right to herself, as in the case of civil cases from Canada.

Lord Fitzgerald pointed out that there was nothing in the Act, of 1880 making the decision of the Court of Queen's Bench of Manitoba final. There was only a limited appeal to that court, and therefore the inference from the act rather was that the larger right of appeal to the Queen in Council had not been abandoned.

Mr. Bigham submitted that on the authorities there was a right to allow the appeal if the circumstances were such as to justify it.

LORD HALSBURY, L. C., p. 677:—It is the usual rule of this committee not to grant leave to appeal in criminal cases, except when some clear departure from the requirements of justice is alleged to have taken place.

In re A. M. DILLET ¹

114. Her Majesty will not review criminal proceedings unless it be shewn that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.

IN DIVORCE CASES.*D'ORLAC v. D'ORLAC* ²

115. The *Cour d'Appel*, in Mauritius, cannot grant leave of appeal to the Judicial Committee from a sentence of divorce. But leave was granted by their Lordships on special application.

IN ELECTION CASES.*THÉBERGE v LANDRY* ³

116. The appellant asked leave to appeal from a judgment of the Superior court which declared his election as member of the Parliament of the Province of Quebec, null and void, and their Lordships for the reasons mentioned below refused the application.

THE LORD CHANCELLOR (LORD CAIRNS), p. 106:—Their Lordships wish to state distinctly, that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away except by express words; and they

¹ Honduras, 1887 March 19, L. R. XII Appeal Cases 459.

² Mauritius, 1844 May 9, IV Moore 374.

³ Quebec, 1876 Nov. 7, L. R. II Appeal Cases 102.

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would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shewn to take away that prerogative. But, in the opinion of their Lordships, a somewhat different question arises in the present case. These two acts of Parliament, the acts of 1872 and 1875, are acts peculiar in their character. They are not acts constituting or providing for decision of mere ordinary civil rights; they are acts creating an entirely new, and up to that time unknown jurisdiction in a particular court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly, of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind, is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known.....

P. 107. The whole scheme, therefore, of the Act of Parliament is that, once the action of the Superior Court takes place, and the decision of the Superior Court arrived at, the machinery is to go on just as it had formerly gone on inside the Legislative Assembly; writs are to be issued, seats are to be taken, other proceedings are to be had, as would have been the case before the court was called into operation, and when the Legislative Assembly decided these matters by its own authority.

Stopping there, it would be very difficult to do otherwise than conclude, from the character of these enactments, that the object which the Legislature had in view was to have a decision of the Superior Court, which, once arrived at, should be for all purposes conclusive.

But there is a further consideration which arises upon this act. If the judgment of the Superior Court should not be conclusive, of course the argument is that the power which is to be brought to bear to review the judgment is the power of the Crown in Council.

Now, the subject matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and the privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly. Above all, they have been looked upon as rights and privileges which pertain to the Legislative Assembly in complete independence of the Crown, so far as they properly exist. And it would be a result somewhat surprising, and hardly in consonance with the general scheme of the legislation, if, with regard to the rights and privileges of this kind, it was to be found that in the last resort the determination of them no longer belonged to the Superior Court, which the Legislative Assembly had put in its place, but belonged to the Crown in

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Council, with the advice of the advisers of the Crown at home, to be determined without reference either to the judgment of the Legislative Assembly, or of that Court which the Legislative Assembly had substituted in its place.

These are considerations which lead their Lordships not in any way to infringe, which they would be far from doing, upon the general principle that the prerogative of the Crown, once established, cannot be taken away, except by express words: but to consider with anxiety whether in the scheme of this legislation it ever was intended to create a tribunal which should have, as one of its incidents, the liability to be reviewed by the Crown under its prerogative. In other words, their Lordships have to consider, not whether there are express words here taking away prerogative, but whether there ever was the intention of creating this tribunal with the ordinary incident of an appeal to the Crown. In the opinion of their Lordships, adverting to these considerations, the 90th section, which says that the judgment shall not be susceptible of appeal, is an enactment which indicates clearly the intention of the Legislature under this Act,—an Act which is assented to on the part of the Crown, and to which the Crown, therefore, is a party,—to create this tribunal for the purpose of trying election petitions in a manner which should make its decision final to all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative.

In the opinion, therefore, of their Lordships, there is not in this case, adverting to the peculiar character of the enactment, the prerogative right to admit an appeal, and therefore the petition must be refused.

VALIN V. LANGLOIS ¹

117. The constitutionality of the *Dominion Controverted Elections Act of 1874*, (37 Vict. ch. 10) maintained. The Parliament of Canada has power to commit such jurisdiction to existing provincial courts. Special leave to appeal refused.

LORD SELBORNE, p. 117:—Their Lordships have carefully considered the able argument which they have heard from Mr. Benjamin, and they feel glad that so full an argument has been offered to them, because there can be no doubt that the matter is one of great importance. The petition is to obtain leave to appeal from two concurrent judgments of the Court of first instance and of the Court of Appeal, affirming the competency and validity of an Act of the Dominion Legislature of Canada. Nothing can be of more importance certainly than a question of that nature, and the subject matter also, being the mode of determining election petitions in cases of controverted elections to seats in the Parliament of Canada, is beyond all doubt of the greatest general importance. It, therefore, would have been very unsatisfactory to their Lordships to be obliged to dispose of such an application without at least having the grounds of it very

¹ Quebec, 1879 Dec. 13, L. R. V. Appeal Cases 115.

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fully presented to them. That has been done, and I think I may venture to say for their Lordships generally that they very much doubt whether, if there had been an appeal and counsel present on both sides, the grounds on which an appeal would have been supported, or might have been supported, could have been better presented to their Lordships than they have been on the present occasion by Mr. Benjamin.

In that state of the case their Lordships must remember on what principles an application of this sort should be granted or refused. It has been rendered necessary, by the legislation which has taken place in the colony, to make a special application to the Crown in such a case for leave to appeal; and their Lordships have decided on a former occasion that a special application of that kind should not be lightly or very easily granted; that it is necessary to shew both that the matter is one of importance, and also that there is really a substantial question to be determined. It has been already said that their Lordships have no doubt about the importance of this question, but the consideration of its importance and the nature of the question tell both ways. On the one hand those considerations would undoubtedly make it right to permit an appeal, if it were shewn to their Lordships, *prima facie*, at all events, that there was a serious and a substantial question requiring to be determined. On the other hand, the same considerations make it unfit and inexpedient to throw doubt upon a great question of Constitutional Law in Canada, and upon a decision in the Court of Appeal there, unless their Lordships are satisfied that there is, *prima facie*, a serious and a substantial question requiring to be determined. Their Lordships are not satisfied in this case that there is any such question, inasmuch as they entertain no doubt that the decisions of the Lower Courts were correct. It is not to be presumed that the Legislature of the Dominion has exceeded its powers, unless upon grounds really of a serious character. In the present case their Lordships find that the subject matter of this controversy—that is, the determination of the way in which questions of this nature are to be decided as to the validity of the return of members to the Canadian Parliament—is beyond all doubt placed within the legislative power of the Dominion Parliament by the 41st section of the Act of 1867, to which reference has been made. Upon that point no controversy is raised. The controversy is solely whether the power which that Parliament possesses of making provision for the mode of determining such questions has been competently or incompetently exercised. The only ground on which it is alleged to have been incompetently exercised is that by the 91st and 92nd clauses of the Act of 1867, which distribute legislative powers between the Provincial and the Dominion Legislatures, the Dominion Parliament is excluded from the power of legislating on any matters coming within those classes of subjects which are assigned exclusively to the Legislatures of the Provinces. One of those classes of subjects is defined in these words, by the 14th sub-section of the 92nd clause:—"The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts,

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both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts." The argument, and the sole argument, which has been offered to their Lordships to induce them to come to the conclusion that there is here a serious question to be determined is that the Act of 1874, the validity of which is challenged, contravenes that particular provision of the 92nd section which exclusively assigns to the Provincial Legislatures the power of legislating for the administration of justice in the Provinces, including the constitution, maintenance and organization of Provincial Courts of civil and criminal jurisdiction, and including procedure in civil, not in criminal, matters in those Courts. Now, if their Lordships had for the first time, and without any assistance from anything which had taken place in the colony, to apply their minds to that matter, and even if the 41st section were not in the Act, it would not be quite plain to them that the transfer of the jurisdiction to determine upon the right to seats in the Canadian Legislature—a thing which had been always done, not by Courts of Justice, but otherwise—would come within the natural import of those general words: "The administration of justice in the Province, and the constitution, maintenance and organization of Provincial Courts, and procedure in civil matters in those Courts." But one thing is clear, that those words do not point expressly, or by any necessary implication, to the particular subject of election petitions; and when we find in the same Act another clause which deals expressly with those petitions, there is not the smallest difficulty in taking the two clauses together, and in placing upon them both a consistent construction. That other clause, the 41st, expressly says that the old mode of determining this class of questions was to continue until the Parliament of Canada should otherwise provide. It was, therefore, the Parliament of Canada which was otherwise to provide. It did otherwise provide by the Act of 1873, which Act it afterwards altered, and then passed the Act now in question. So far, it does not appear to their Lordships very difficult to suggest any ground upon which the competency of the Parliament of Canada so to legislate could be called in question. But the ground which is suggested is this: that it has seemed fit to the Parliament of Canada to confer the jurisdiction necessary for the trial of election petitions upon Courts of ordinary jurisdiction in the Provinces; and it is said that although the Parliament of Canada might have provided in any other manner for these trials, and might have created any new Court for this purpose, it could not commit the exercise of such a new jurisdiction to any existing Provincial Court. After all their Lordships have heard from Mr. Benjamin, they are at a loss to follow that argument, even supposing that this were not in truth and in substance the creation of a new Court. If the subject matter is within the jurisdiction of the Dominion Parliament, it is not within the jurisdiction of the Provincial Parliament, and that which is excluded by the 91st section from the jurisdiction of the Dominion Parliament is not anything else than matters coming within the class of subjects assigned exclusively to the Legislatures of the Provinces. The only material class of subjects relates to the admini-

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nistration of justice in the Provinces, which, read with the 41st section, cannot be reasonably taken to have anything to do with election petitions. There is, therefore, nothing here to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing Provincial Courts, or to give them new powers as to matters which do not come within the classes of subjects assigned exclusively to the Legislatures of the Provinces. But, in addition to that, it appears that by the Act of 1873, which, even by those judges who are said to have disputed the competency of the Act of 1874, is admitted to have been competent to the Dominion Parliament, what appears to their Lordships to be exactly the same thing in substance, and not so very different even in form, was done. It was intended that when a Court of Appeal should be constituted for the Dominion, a judge of that Court of Appeal should be the judge in the first instance of election petitions, and three judges of the same Court should have power to sit in appeal from any judgment of a single judge. But it was necessary also to provide for the interval between the passing of the Act and the constitution of such a Court of Appeal, and that Act of 1873 provided that in the meantime the judges of existing Provincial Courts should exercise under regulations contained in it the same jurisdiction. It did not, indeed, say the Courts—it said the judges of the Courts, and that is really in their Lordships' view the sole difference for this purpose between the Act of 1873 and the Act of 1874. The Act of 1874 in substance does the same thing, except that in the definition clauses it uses this language:—"The expression 'the Court,' as respects elections in the several Provinces hereinafter mentioned respectively, shall mean the Courts hereinafter mentioned, or any of the judges thereof"; and then it mentions by their known names the existing Courts of the different Provinces. When their Lordships go on to look at the provisions which follow in the Act, it is clear not only that a new jurisdiction is provided for, but even the power to take evidence. It is said that a single judge in rotation, and not the entire Court, is to exercise this jurisdiction, and in the forty-eighth section:—"That on the trial of an election petition, and in other proceedings under this Act, the judge shall, subject to the provisions of this Act, have the same powers of jurisdiction and authority as a judge of one of the Superior Courts of Law or Equity for the Province in which such election is held, sitting in term or proceeding at the trial of an ordinary civil suit, and the Court held by him in such trial shall be a Court of Record." Words could not be more plain than those to create this as a new Court of Record, and not the old Court, with some superadded jurisdiction to be exercised, as if it had been part of its old jurisdiction; and all that is said as to the employment of the same officers, or of any other machinery of the Court for certain purposes defined by reference to the existing procedure of the Courts, shows that the Dominion Legislature was throughout dealing with this as a new jurisdiction created by itself, although in many respects adopting, as it was convenient that it should adopt, existing machinery. Therefore, their Lordships see nothing but a nominal, a verbal, and an unsubstantial distinction

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between this latter Act as to its principle and those provisions of the former Act, which all the judges of all the Courts in Canada, apparently without difficulty, held to be lawful and constitutional. Their Lordships are told that some of the judges of the Courts of first instance have thought there was more of substance in the distinction than there appears to their Lordships to be, and have declined to exercise this jurisdiction. It has been said that five judges have been of that opinion. On the other hand, two judges of the first instance, I think both in the Province of Quebec, the Chief Justice in the present case, and in another case Mr. Justice Caron, a judge whose experience on the Canadian Bench has been long, and whose reputation is high, have been of opinion that this law was perfectly within the competency of the Dominion Legislature, and they could see nothing in the distinction taken between the present law as to its principle and the former; and now the question has gone to the Court of Appeals. The Supreme Court of Canada, which, constituted as a full Court of four judges, has unanimously been of that opinion, and nothing has been stated to their Lordships, even from those sources of information with which Mr. Benjamin has been supplied, and which he has very properly communicated to their Lordships; nothing has been stated to lead their Lordships at all to apprehend that there is any real probability that any judge of the inferior Courts will hereafter dispute their obligation to follow the ruling of the Supreme Court, unless, and until, it shall be reversed by Her Majesty in Council. Nothing has been said from which their Lordships can infer that any Provincial Legislature is likely to offer any opposition to such a ruling on this question as has taken place by the Court of Appeals, unless, as has been said, it should at any future time be reversed by Her Majesty in Council. Under these circumstances their Lordships are not persuaded that there is any reason to apprehend difficulty or disturbance from leaving untouched the decision of the Court of Appeals. Their Lordships are not convinced that there is any reason to expect that any of the Judges of the Court below will act otherwise than in due subordination to the appellate jurisdiction, or refuse to follow the law as laid down by it. If, indeed, the able arguments which have been offered had produced in the mind of any of their Lordships any doubt of the soundness of the decision of the Court of Appeals, their Lordships would have felt it their duty to advise Her Majesty to grant the leave which is now asked for, but on the contrary the result of the whole argument has been to leave their Lordships under the impression that there is here no substantial question at all to be determined, and that it would be much more likely to unsettle the minds of Her Majesty's subjects in the Dominion, and to disturb in an inconvenient manner the legislative and other proceedings there, if they were to grant the prayer of this petition, and so throw a doubt on the validity of the decision of the Court of Appeals below, than if they were to advise Her Majesty to refuse it. Under these circumstances their Lordships feel it their duty humbly to advise Her Majesty that this leave to appeal should not be granted, and that the petition should be dismissed.

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KENNEDY V. PURCELL ¹

118. The Judicial Committee will not grant leave of appeal, as an act of grace, on special application, in the matter of contested elections. The Canadian statute having appointed for these contestations a special tribunal with a special procedure and declared that the judgment of the Supreme Court of Canada shall be final, it is clearly the intention of the parliament to confine the decisions locally within the colony itself.

LORD HOBHOUSE, p. 280:—It is now urged by the petitioner that inasmuch as the questions decided are important questions of law affecting the construction of election statutes, and there is good ground for doubts as to the soundness of the decision, Her Majesty in Council should entertain the appeal.

On the other side, the importance of the question was not denied, nor is it denied that the decision is not fairly open to argument. But it is contended, first, that the subject matter is not one with respect to which the prerogative of the Crown exists; and secondly, that if the prerogative exists, it is not proper to exercise it.

To support the first proposition, the case of *Théberge v. Landry* is relied on. That case arose under the Quebec Elections Act of 1875, by which the jurisdiction to try the election petitions was given to the Superior Court, whose decisions were declared not susceptible of appeal. The petitioner sought to appeal on the merits of the election. The decision of the Judicial Committee was not that the prerogative of the Crown was taken away by the general prohibition of appeal, but that the whole scheme handing over to the Courts of Law disputes, which the Legislative Assembly had previously decided for itself, showed no intention of creating tribunals with the ordinary incident of an appeal to the Crown.

In the case of *Valin v. Langlois*, the petitioner asked leave to appeal to the Supreme Court of Canada under the Controverted Elections Act of 1874, which was one of the Statutes consolidated by the Act now in question. The ground of appeal was that the Act, being a Dominion Act, was *ultra vires* of the Dominion, in assuming to give to Acts in Quebec jurisdiction over elections in Quebec to the Canadian House of Commons.

The Judicial Committee held that there was no ground for any such contention, and dismissed the petition; but it was said that, if they had doubted the soundness of the decision below, they would have advised Her Majesty to grant leave of appeal. That opinion is now relied upon as limiting or contravening the effect of the decision in *Théberge v. Landry*.

Their Lordships did not think that for the present purpose any useful or substantial distinction could be taken between the Statute that was the subject of decision in *Théberge v. Landry*, and that which was the subject of decision in *Valin v. Langlois*, and those which were now in question. In all three cases there was the broad consideration of the inconvenience of the Crown interfering in elec-

¹ S. C. Ontario, 1888 July 7, 59 Law Times N. S. 279.

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tion matters, and the unlikelihood that the Colonial Legislature should have intended any such result. In all three there was the creation of a special tribunal for the trial of petitions, in the sense that the litigation was not left to follow the course of an ordinary suit, but was subjected to a special procedure with limitations of its own. And in all three there was the same expression of the intention to make the Colonial decision final. But such variance as there was between the two cited cases was only to this extent—that the Committee in the latter case must have thought that the existence of the prerogative was still susceptible of argument when the dispute went to the very root and validity of a law passed by Parliament to take effect in a Province. Their opinion on an *ex parte* hearing, and on the sole question whether or no there should be any further argument on the matter, could not be put higher than that.

Their Lordships do not find it necessary to give any decision on the abstract question of the existence of the prerogative in this case, because they are satisfied that, if it exists, it ought not to be exercised in the case before them.

It is true that the questions are very difficult, and that they affect the administration of the whole law on this subject; but the range of cases affected by them must be very narrow. It was not suggested that in the present Parliament there was a single case, except the one under appeal. There could be no other case until fresh elections took place, and, if the decisions given had really misinterpreted the mind of the Legislature, and were calculated to establish rights of procedure less convenient than those intended, the Legislature would at once set the matter right.

This peculiarity of the subject-matter greatly diminished the force of the consideration—usually a strong one—that the decision complained of affected general questions of law.

The next observation their Lordships have to make is that the Statutes show throughout a desire to have these matters decided quickly. There are most obvious reasons for such a desire. The legal duration of a Parliament, their Lordships understand, is five years, and its usual duration four years. It is most important that no long time should elapse before the constitution of the body is known; and yet, if the Crown is to entertain appeals in such cases, the necessary delays attending such appeals would greatly extend the time of uncertainty which the Legislature has striven to limit.

Again, the intention to confine the decision locally within the Colony itself is just as clear as the intention to get it declared speedily, because it is expressed that the decision of the Supreme Court shall be final.

It seems to their Lordships that there are strong reasons why such a matter should be decided within the Colony, and why the prerogative of the Crown should not (even if it legally can) be extended to matters over which it has no power and with which it has no concern, until the Legislative bodies choose to hand over to judicial functionaries that which was formerly settled by themselves.

Before advising such an exercise of the prerogative, their Lord-

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ships would require to find an indication of an intention that the new proceedings should so follow the course of ordinary law as to attract the prerogative. The indications they did find were of the contrary tendency. The result is that their Lordships could not advise Her Majesty to grant the leave asked, and the petition must be dismissed with costs.

IN FORMA PAUPERIS:

BROUARD V. DUMARESQ¹

119. Leave to appeal in *forma pauperis* allowed, and sureties for prosecuting appeal dispensed with; the petition was supported by an affidavit, stating the facts, and that the petitioner was not worth £5 in the world, excepting his wearing apparel, and his interest in the matter at issue; and that he was unable, by reason of his poverty, to find sureties for prosecuting the appeal.

LAIT V. BAILEY²

120. The rule to be observed in future is that a party cannot be admitted to appeal in *forma pauperis* to the Judicial Committee, unless he files a certificate of an advocate of the bar of the court appealed from, to the effect that he has a just and probable cause of appeal, accompanied with the applicant's oath as a pauper, and to the facts of the grounds alleged.

SIR FREDERICK POLLOCK, p. 437:—In the common law courts, precaution is taken to ascertain that there is good ground of litigation; parties ought not to be vexed with a suit which must entail expense. We require a certificate from a gentleman at the bar that there is good ground for appeal, and the pauper is required to make oath to the facts of the grounds alleged.

THE RIGHT HON. PEMBERTON LEIGH, p. 437:—It is clear that there ought to be some check upon applying for leave to appeal in *forma pauperis*. We will consider this application, and see if we can make some general order.

Judgment was delivered on the following day by:

THE RIGHT HON. DR. LUSHINGTON, p. 437:—Their Lordships consider that a certificate signed by counsel, that the cause is a proper one for appealing, ought to be produced, when their Lordships, if they think fit, will order the Surrogate to admit the appeal in the usual way. This rule is to be general, and apply to all pauper appeals.

WATTS V. BEAMAN³

121. An appellant who had not sued as pauper in the court below, admitted to appeal in *forma pauperis*, upon the

¹ Jersey, 1848 Dec. 11, VI Moore 412.

² Canterbury, 1851 June 26, VII Moore 436.

³ Canterbury, 1854 April 6, IX Moore 81.

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usual certificate, without giving security for the costs already incurred, and in which she had been condemned by the decree of the court below.

BISHOP V. WILDBORE ¹

122. An application to proceed in *forma pauperis*, by a married woman who was entitled to an annuity left to her separate and charged upon property which was in course of administration in the court of Chancery, but without any immediate prospect of obtaining the arrears of such annuity, was granted. Her husband was an uncertificated bankrupt with protection, and, although in temporary employment as an attorney's clerk, was with his wife in destitute circumstances.

In re LEMPRIÈRE ²

123. Upon an affidavit and the usual certificate, leave to appeal in *forma pauperis* was granted.

KELLY V. CASLETT ³

124. Leave to appeal in *forma pauperis* was granted subject to a certificate of counsel being obtained that there are merits and without the usual securities.

GAUDIN V. MESSERVY ⁴

125. There may be circumstances in which a guardian may be permitted to prosecute an appeal in *forma pauperis*, on the ground of the poverty of his ward; but the court requires an affidavit that the infant cannot get a solvent next friend to prosecute the appeal, and explanation must be given how security had being given in the court below.

IN JERSEY ISLAND. See PRACTICE: *iisdem verbis*.

IN MATTERS OF DISCRETION.

In re McDERMOTT ⁵

126. Leave to appeal given from an Order of the Supreme Court of *British Guiana*, condemning the publisher of a local journal to six months' imprisonment for contempt of Court, in publishing in a journal comments on the administration of justice by that court.

The right to the judges of the Supreme court to object to the competency of such appeal at the hearing was reserved.

LORD WESTBURY, p. 119:—Their Lordships regard this case as one of great importance, and one that may lead to important con-

¹ Canterbury, 1855 Feb. 7, Moore 408.

² Jersey, 1858 Feb. 2, XI Moore 398.

³ Isle of Man, 1860 July 9, XIV Moore 89.

⁴ Jersey, 1864 Nov. 28, II Moore N. S. 372.

⁵ British Guiana, 1866 Nov. 5, IV Moore N. S. 110.

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sequences. On the one hand it is essential to preserve a Court from all obstruction to the course of Justice; on the other hand, it is very desirable that there should be a check upon any arbitrary exercise of the powers of the Court. But at present, having regard to the distinction between things done by practitioners of Colonial Courts, and things done *in curia*; things done directly leading to interference with the administration of Justice, and things which do not come within either of these categories, their Lordships are disposed to give leave to appeal.

McDERMOTT V. JUDGES OF BRITISH GUIANA¹

127. A court of record has the power to commit for contempt, but the exercise of such a power is discretionary with the court and is not the subject of appeal in ordinary cases.

THE BANK OF HINDUSTAN CHINA AND JAPAN V. THE EASTERN FINANCIAL ASSOCIATION²

128. The appeal was from a judgment of the High court at Bombay sanctioning proceedings made by liquidators of a joint stock company under colonial statute. As the matter was one of discretion vested in the court, and no principle had been violated, the Judicial Committee would not interfere.

RAINY V. BRAVO³

129. The court below refused an amendment which shut out one of the parties, in a case of libel, from adducing the evidence of important witnesses to prove the contents of a destroyed letter, the basis of the action. On an appeal on that point the Judicial Committee, although reluctant to interfere with the discretion of the court below, reversed the judgment and allowed the amendment, the costs being divided.

IN MATTERS OF INSOLVENCY.***In re ABRAHAM⁴***

130. The case was under the appealable value and was not an appealable grievance under the law of Jamaica. The judgment was from the Supreme court refusing to quash a certificate or fiat of insolvency. Special leave of appeal was refused as an appeal would not be consistent with the rights of the creditors and the practice of the Privy Council.

¹ British Guiana, 1868 Feb. 1, V Moore 466.

² Bombay, 1869 March 15, VI Moore N. S. 114.

³ Sierra Léona, 1872 11 Juin, IX Moore N. S. 35.

⁴ Jamaica, 1864 June 14, II Moore N. S. 211.

IN MATTERS OF INSOLVENCY.

CUSHING V. DUFFY¹

131. The Judicial Committee held that the Dominion parliament had power to take away the right of appeal *de plano* to the Privy Council in matters of insolvency.

On special application an appeal was allowed as an act of grace. See LEGISLATURE: *legislative powers*.

BANK OF NEW BRUNSWICK V. MCLEOD²

132. An application for leave to appeal in a matter of insolvency was refused. Their Lordships in refusing the demand made the following remarks:

"First. The policy of the Dominion Legislature is to discountenance appeals in matters of Insolvency, so much so that not even an appeal to the Supreme Court of Canada is allowed, and the final decision is made to rest with the highest court in each province.

"Second. The Dominion Legislature cannot affect the Prerogative of the Crown to grant special leave to appeal, but in advising Her Majesty whether the prerogative should be exercised, the Privy Council pays attention to the expressed wishes of the colony, and will not recommend its exercise except in cases of general interest and importance, and then only when it manifestly appears that the Court below has erred in a matter of law.

"Third. But even if it should be shown that the Court below has so erred, leave will be refused if it appears that the Court below has decided the case independently of any point of law upon a particular view of the facts, for the Privy Council adopts the facts as found by the Court below, and will not review such findings in an appeal entertained as an act of grace.

"Fourth. Their Lordships without expressing any decided opinion as to whether the Court below was right or wrong on the point of law (*i. e.*, the construction of the Bill of Sale Act and the Insolvency Act of 1875), thought that the question was arguable, and if the decision had turned upon this alone would have been prepared to grant an appeal. But it appeared to their Lordships that the judgment of the Supreme Court was founded on the special facts of the case as found by the Court, the decision as to which affected only the parties to the case, and did not involve any general question. Their Lordships could not review the finding of the Supreme Court to the effect that there was, in fact, no agreement to allow the overdraft; that the transaction was a voluntary assignment on the part of the Insolvents, and that it was made in contemplation of bankruptcy to the knowledge of the Bank.

"It is fair to add that the views clearly expressed by their Lordships during the course of the argument, lent no colour whatever to any supposition that their Lordships agreed with the findings of the facts of the case by the Supreme Court.

"Thus it appears that although the tendency of their Lordships'

¹ Quebec, 1880 April 15, L. R. V Appeal Cases 409.

² New Brunswick, 1882 June 24.

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opinions seemed to favour the views of the Bank, both as to the construction of the statutes and as to the true effect of the transaction between the parties, yet acting on the rules they have now for the first time laid down, their Lordships felt themselves constrained to reject the application.

"The propriety of these rules cannot, we think, be questioned, though we much regret that in the present instance they should bear so hardly on the clients."

IN MATTERS OF CAPIAS.MOLSON V. CARTER ¹

133. No appeal to the Privy Council lies from a judgment maintaining a *capias* and dismissing a petition in contestation of the *capias*.

SIR JAMES COLVILLE: — It is obvious that their Lordships would not, according to their usual practice, nor could they with propriety, grant special leave to appeal upon a question of this kind, unless they saw clearly that there had been some miscarriage in point of law, or very gross miscarriage in the two Courts, whose concurrent judgments are under appeal, on the matters of fact.

Now, without going into complicated proceedings that have been commented upon in this case, it is sufficient to state that the judgments of the Court below may be taken to have proceeded almost exclusively upon the act of the petitioner, in altering the deposit account of a certain sum of money in the Mechanics Bank, and the facts which led to that were simply these: The defendant borrowed from the plaintiff a sum which may be stated in round numbers at \$32,000, ostensibly upon the security of certain property. He paid the sum of money into this Bank in his own name with a sort of special mark. As found, in July 1874, he altered the heading of that deposit account so as to make it appear that the money was his wife's. The Bank became insolvent a month or two later, but just when it was on the eve of insolvency he drew out the \$32,000 upon a receipt signed by him for and as the agent of his wife; and it is upon that transaction that the Courts below have principally proceeded.

Now it is to be remarked that one of the learned Judges, Mr. Justice Monk, whose final judgment was in favor of the defendant, says this: "If Molson had altered the heading of the account on the eve, or immediately before the insolvency of the Bank, for the purpose of making it falsely appear that the \$32,000 deposited in the Bank belonged to his wife and children when they really belonged to himself, and if this had been done with a view of making the withdrawal of the sum from the Bank possible, or at all events more easy of accomplishment, and with the further view, after such withdrawal, of making away with the amount to the detriment of his creditors in general and the plaintiff in particular, I think the *capias* might have been maintained; for this would not be a case of so-called

¹ Quebec, 1880 Nov. 27.

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constructive secretion, which it is not clear the law recognizes, but a case of actual secretion; the altering of the heading of the account being the "first step in the process." But afterwards, and in some degree because this alteration of the account was not immediately before the insolvency of the Bank, but a month or two earlier, the learned Judge came to the conclusion at which he ultimately arrived in favor of the defendant. It appears, however, to their Lordships that there was abundant evidence from which Mr. Justice Papineau, sitting in the Superior Court, and the majority of the Judges of the Appellate Court, might come to the conclusion that the transaction was really one of the nature described by Mr. Justice Monk, and that it was a case of actual secretion or making away of property of the debtor within the meaning of the Code of Procedure. It is not necessary for them, they think, to go further, and to express a fuller opinion of their own on the facts of the case which they have not heard fully, and of course having had no opportunity of going in detail through the evidence in the case. Their Lordships, however, think that the Judges had before them ample evidence of the fraudulent intent which was imputed to the petitioner.

The case was put finally by Mr. Digby in this way, that the money was either the money of the wife, or that it was not; that if it was her money, it was right to give it to her; that if it was not her money, then that it could be shown to be properly applied. But their Lordships think there is no pretence whatever on the facts for saying that this money was the money of the wife. It was set up, after the transaction of borrowing took place, that the property pledged was property which the defendant had no right to pledge, but that it was property which his wife and children, under his father's will, had by some substitution of interest which prevented his disposing of it. The money was borrowed by him on his own credit. The only inference to be drawn from the title of the wife, supposing it to be a good title, would be that it was a fraudulent transaction, in so far as it purported to pledge property that was not his. She could not have both the property and the money, and it is quite clear from some of the evidence which has been brought before their Lordships, that the petitioner has been treating this property as her's, that a lease has been granted of it, and he himself admits he is receiving rent payable by the lessee as *aliment* for his wife and children. Then if it were not her money the fraudulent act, if it were fraudulent, was complete when it was transferred into her name and afterwards withdrawn in her name, and withdrawn, too, as he then avowed, in order that he should not himself come upon the street, a statement which could only mean that he either wished to make a provision for his wife to keep him off the street, or that he had withdrawn it for his own purposes. The subsequent application of it to other creditors would not if established, have been material, and that, therefore, is an answer to the argument that the case should be sent for a new trial, or otherwise put into a way for further investigation in order that Mr. Barnard, the petitioner's solicitor, should be examined.

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On the whole, their Lordships think that they cannot advise Her Majesty to grant special leave to appeal, and that this petition must be dismissed with costs.

CARTER V. MOLS¹

134. There is no appeal, under article 1178 of the Code of Civil Procedure, from a judgment of the court of Queen's Bench in a matter of imprisonment. On special application, leave to appeal was granted. *See* ABANDONMENT OF PROPERTY.

IN MATTERS OF EXECUTION.

NIENWERKERK V. REYNOLDS²

135. An execution having been taken in virtue of a judgment rendered by a court of justice in Berbice Island, a petition was presented to stop the proceedings, but was dismissed as the grounds of the petition should have been opposed at the hearing of the case before judgment. In an appeal to the Privy Council, the judgment was confirmed.

LORD WYNFORD, p. 167: — It would be a most inconvenient doctrine, and inconsistent with the principles of justice to allow a man to appeal against a writ of execution, and upon that appeal to go into the merits of the original judgment.

IN QUESTIONS OF FACT TRIED BY A JURY.

COWIN V. MOORE³

136. On an issue involving a question of fact, tried by a jury, the Judicial Committee will not reverse the finding of the jury unless anything material has been admitted as evidence which was not legal; or any thing material has been tend red as evidence and rejected, which ought to have been received; or in case of misconduct on the part of the jury or any member of it.

DAGNITO V. BELLOTTI⁴

137. Where a defendant objected to a verdict on the ground that it was not warranted by the evidence, but neglected to move the court below for a new trial, in the manner directed by the rules and practice of the court, the appeal was refused.

COMMISSIONER FOR RAILWAYS V. BROWN⁵

138. Where the evidence on both sides has been properly put before the jury, the verdict of the jury once found ought not to be disturbed.

¹ Quebec, 1883 April 18, L. R. VIII Appeal Cases 530.

² Berbice, 1829 1 Knapp 151.

³ Isle of Man, 1861 June 19, XIV Moore 354.

⁴ Gibraltar, 1886 July 16, L. R. II Appeal Cases 604.

⁵ South Wales, 1887 Dec. 10, L. R. XIII Appeal Cases 133.

IN QUESTIONS OF FACT TRIED BY A JURY.

The order of the court below, which had set aside a verdict as against the weight of evidence, though it was neither unreasonable nor unfair, nor dissented from by the judge who tried the case, was reversed.

IN QUESTIONS OF FACT.MOORE V. LUCAS ¹

139. The Judicial Committee never reverse a judgment on a question of fact, unless they are satisfied that the judgment is clearly wrong.

GRAVEL V. MARTIN ET AL. ²

140. The Privy Council will reverse a judgment on questions of fact only when there are very strong reasons which establish clearly that the court below was wrong.

PER CURIAM:—Their Lordships are always reluctant to reverse a finding upon a mere question of fact, even by a single Court of Justice, but they are still more reluctant so to do when the decision of the Court which tries the case in the first instance has been affirmed by a Superior Court of Justice, and when there are two concurrent judgments upon a question of fact. As a general rule their Lordships do not interfere with such a finding, and there must be some very good reason to induce them to reverse a decision of a Court upon a question of fact, when that decision affirms the decision of a lower Court.

Now, dealing with the evidence which was given upon the trial, we are met by the statement which the defendant himself gave three days after the alleged robbery was committed. He says the robbery was committed on the 19th June. On the 21st June he made a statement before the magistrates as to the circumstances under which the alleged robbery was committed. Now the circumstances which he then related, when the facts must have been fresh in his memory, are wholly at variance with the evidence which he gave at the trial, both as to the time at which the robbery took place and as to the place at which it took place. On the trial he stated that when he found the steamer moving he went to the steward to ask him to assist him in removing his valise. He says that about ten minutes elapsed between the time when he left his cabin and all was right and the time when he found the steward. But upon his first examination before the magistrates he stated that the robbery had taken place before the steamer left the quay, and that he gave information to the police upon the subject; and one of the detective police officers also states that defendant told him that the robbery had taken place before the steamer left the quay. Then the question is, are we to say that the judges were wrong in disbelieving the evidence which the defendant gave upon the trial of the cause when he had given previously, on the 21st of June, 1869, only two days after the alleged

¹ Isle of Man, 1851 Feb. 17, VII Moore 352.

² Quebec, 1876 May 5.

IN QUESTIONS OF FACT.

robbery had taken place, and when the facts must have been fresh in his memory, a statement wholly inconsistent with that evidence? There are many other discrepancies between the evidence which he gave at the trial and the statement which he made before the police magistrates; and there are also discrepancies between his evidence and the evidence of Biron, the steward. He says that when he looked into the cabin he saw the valise on the floor, opened, and then he exclaimed "My God! I've been robbed!" Biron, on the other hand, stated in his affidavit, that when he entered the cabin the valise was on the berth and that the defendant opened the valise. So that the valise must have been lying, if Biron's evidence is correct, on the berth in the cabin, closed up; and if it was in that state, the defendant must have been wrong in stating that when he looked into his cabin he saw the valise lying on the ground, opened, and everything in disorder. But it must be said, with reference to that statement which Biron made in his affidavit, that he did not state in his evidence anything as to where the portmanteau was found. At page 64, line 20, he said, "After that passed by the cabin No. 101; the defendant followed me, and we passed behind the cabin. The defendant entered into the cabin through the window. As to me, I do not recollect whether I entered in the cabin or whether I remained at the window, but I recollect well upon entering the cabin the defendant lifted the cover of the valise and took out his clothes, which he threw upon the ground."

Now, with the inconsistent statement which the defendant made before the magistrates when the matter was fresh in his memory, we are called upon to say that the two Courts of Justice who have found that the defendant had failed to prove that the robbery was committed, were in error, and that we ought to reverse their decision, and find that the defendant has proved satisfactorily by the evidence at the trial that a robbery was committed.

None of the judges found, as a fact, that the defendant himself committed the robbery, and their Lordships abstain from expressing any opinion upon the subject. All that the judges did below was to find that the defendant had not proved that the money was stolen, and that is all their Lordships do in affirming the judgment of the Court of Queen's Bench.

Under these circumstances their Lordships will humbly recommend Her Majesty to affirm the judgment of the Court of Queen's Bench. The appellant must pay the costs of this appeal.

THE CANADA CENTRAL RAILWAY COMPANY V. MURRAY¹

141. An appeal from the Supreme Court of Canada will not be allowed where the only issue raised is one of fact.

ALLEN V. QUEBEC WAREHOUSE COMPANY²

142. Where there have been concurrent findings of fact by the judges below, the question in appeal is not what con-

¹ Quebec, 1883 June 30, L. R. VIII Appeal Cases 575.

² Quebec, 1886 Nov. 18, L. R. XII Appeal Cases 101.

IN QUESTIONS OF FACT.

clusion their Lordships would have arrived at if the matter had for the first time come before them, but whether it has been established that the judgments of the judges below were clearly wrong.

LORD HERSCHELL, p. 104—Now, it has always been the view taken by this Committee in advising Her Majesty, when the question for determination has been whether the concurrent judgment of the judges who have been unanimous below should be supported or reversed, that unless it be shewn with absolute clearness that some blunder or error is apparent in the way in which the learned judges below have dealt with the facts, this Committee would not advise Her Majesty that the judgment should be reversed. That principle has been laid down in many cases. On this point the observations of *Lord Kingsdown*, in *Naragunty v. Vergano*¹ may be quoted: "It is not", he says, "the habit of their Lordships, unless in very extraordinary cases, to advise the reversal of a decision of the courts of India" (as the principle is equally applicable to other courts) "merely on the effect of evidence or the credit due to witnesses. The judges there have usually better means of determining the questions of this description that we can have, and when they have all concurred, in our opinion it must be shewn very clearly that they were in error to induce us to alter their judgment." And *Lord Cairns* uses these words in delivering the opinion of their Lordships in a subsequent case, *Taresny Churn v. Maitland*². "Now, the learned judges in the courts below, the two judges in the Primary Court, and the three judges in the court of Appeal, have all arrived, without hesitation, at the conclusion that the debt of 43,674 rupees was not a *bona fide* debt due from Obhoy Churn, and it would be far from consistent with the rules which their Lordships have always laid down in dealing with cases of this kind for them to reverse a decision upon a question of fact thus unanimously arrived at by five judges unless the very clearest proof were adduced to their Lordships that that decision was erroneous. It is true that only the two primary judges had before them the witnesses or the witness who were or was examined, but the three judges of the Court of Appeal, conversant with testimony of the kind which has to be dealt with in this case, were of opinion that the two judges of the Court below had arrived at a just conclusion upon the evidence that was adduced." Their Lordships entirely adhere to the views thus expressed, and therefore they do not consider that the question they have to determine is, what conclusion they would have arrived at if the matter had for the first time come before them, but whether it has been established that the judgments of the Courts below were clearly wrong.

See EVIDENCE: appreciation of Evidence.

¹ 9 Moore Indian Appeal cases 87.

² Moore Indian Appeal cases 338.

IN QUESTIONS OF COSTS.

BABOO ULUCK SING V. BENY PESSAD¹

143. A Superior court having affirmed the decree of an Inferior court, with costs against the appellant, but not until they had required and taken much evidence in addition to what had been taken below; the Judicial Committee held that they ought not to have given costs against the appellant, and their decree was so far reversed, although affirmed in other respects.

ATTENBOROUGH V. KENT²

144. An appeal will not lie in respect of costs alone, unless the court below has proceeded upon a mistake or misapprehension and a principle has been violated.

LORD TURNER, p. 352:—Their Lordships do not think it necessary in this case to hear counsel for the respondents. They do not wish to lay it down as a general rule, that in no case would there be an appeal in respect of costs, and of costs alone; because there might be cases where discretion has not been fairly exercised upon the question at issue, and the decision of the court below has proceeded upon mistake or misapprehension. Their Lordships do not think that any general rule can be laid down which must apply to cases of this description. Such cases their Lordships desire to leave untouched; but where there has been *bona fide* care and discretion exercised on the part of the judge who has decided the case, their Lordships have no hesitation in stating their opinion to be, that in such a case no appeal will lie in respect of costs alone.

RICHARDS V. BIRLEY³

145. The above principles were upheld, *Dr. Lushington* remarking that "where there has been *bona fide* care and discretion exercised on the part of the judge who decided the case, their Lordships had no hesitation in stating their opinion to be that, in such a case, no appeal will lie in respect of costs alone."

YEA V. TATEM. THE "ORIENT"⁴

146. A party may be relieved in questions of costs merely, when a principle of law has been violated by the court below in the adjudication upon costs.

SIR JOSEPH NAPIER, p. 32:—Their Lordships do not mean to question or recede from the decisions that have been pronounced regarding not allowing an appeal for costs, but where there has been a mistake upon some matter of law that governs or affects costs—some matter that involves the due application of principles of law

¹ Bengal, 1834 Feb. 11, II Knapp 265.

² Canterbury, 1831 June 15, XIV Moore 351.

³ Prerogative Court of York, 1864 Feb. 18, II Moore N. S. 96.

⁴ Admiralty, 1871 Jan. 16, VIII Moore N. S. 74.

IN QUESTIONS OF COSTS.

the party prejudiced is entitled to have the benefit of correction by appeal.

THE CRÉDIT FONCIER OF MAURITIUS V. PATUREAU ET AL.¹

147. The Judicial Committee does not allow appeals to Her Majesty in Council merely on a question of costs.

When an appeal is taken *de plano* in a case where the appellant has no other interest than to demand the reversal of the judgment of the court below as to costs, he has no *locus standi* before the Judicial Committee, and his appeal must be dismissed.

IN QUESTIONS OF FORM AND PRACTICE.

GRANT V. THE ETNA INSURANCE COMPANY²

148. The following remarks of the Judicial Committee in the two subjoined cases show that they are reluctant to reverse and alter judgments in a question of form and practice, as in questions of fact, costs and discretion.

LORD KINGSDOWN, p. 527:—It is unnecessary to pronounce any decision on a point raised in the argument, viz., that it is not competent to a defendant in a suit to make a motion for judgment *non obstante veredicto*. Such appears to be the rule in England, but the practice in jury trials in Lower Canada differs in many and important respects from that which prevails in this country. Their Lordships are always indisposed to interfere with the judgment of a Colonial Court on a question of its forms and practice.

BOSTON V. LELIÈVRE³

149. LORD WESTBURY, p. 435:—Their Lordships would hesitate very much to interfere with the unanimous judgment of the court below upon a matter of this kind, which is to be regarded as a matter of procedure only, unless they were clearly satisfied that the court had made a great mistake in the construction put upon their statutes.

IN QUESTIONS OF JURISDICTION.

In re ASSIGNEES OF MANNING⁴

150. The court below having declined its jurisdiction, no appeal lies from such a judgment.

IN QUESTIONS OF QUANTUM FOR SALVAGE SERVICES.

TRASK V. MADDON. THE "CARRIER DOVE"⁵

151. In a salvage case where the appeal in substantially confined to the *quantum* of compensation for salvage services

1 Mauritius, 1877 Dec. 5, XXXV Law Times N. S. 869.

2 Lower Canada, 1862 July 5, XV Moore 516.

3 Quebec, 1870 Jan. 25, II Moore N. S. 427.

4 Antigua, 1840 June 30, III Moore 154.

5 Admiralty, 1863 July 30, II Moore N. S. 243.

IN QUESTIONS OF QUANTUM FOR SALVAGE SERVICES.

awarded by the court below, the rule which governs the appellate court is similar to that of the common law courts in dealing with a verdict as to the amount of damages, where the jury have paid attention to the case and have been properly directed by the judge. Their Lordships in such cases, can have but slender means of forming an opinion for themselves, and certainly cannot have better means of forming an opinion than the judge of the Admiralty court.

IN WRITS OF ERROR.*In re RAMSAY* ¹

152. There is no appeal *de plano* from a judgment of the court of Queen's Bench, in appeal, in Lower Canada, quashing a Writ of Error on the ground that there was no appeal from the judgment of the court of first instance condemning a practising attorney to pay a fine for contempt of court.

153. Where a fine is imposed, the remedy is to petition the Crown for a reference to the Judicial Committee, under the statute 3rd and 4th Will IV. c. 41, s. 4.

INSOLVENCY OF APPELLANT PENDING THEGOOROOCHURN SEIN V. RADANAUTH SEIN ²

154. When this appeal was called for hearing, the respondent put before the court the fact that since the appeal, the appellant had been adjudged in bankruptcy under the Insolvent law of Calcutta. The Judicial Committee then postponed the hearing for six months, to enable the official assignee in Insolvency in *Calcutta*, to revive the appeal and prosecute the same; and in default, the appeal to be dismissed; and directed the respondent to serve a notice to that effect on the official assignee in *India*.

No step having been taken by the official assignee within the time limited for prosecution, their Lordships refused a further extension of time, and dismissed the appeal.

OBJECTION TO THE RIGHT OF *See PRACTICE: visdem verbis.***RESTORATION OF**CHOWDRY V. MULLICK ³

155. This appeal had been dismissed for want of prosecution. The Judicial Committee granted leave to restore the

¹ Lower Canada, 1870 Nov. 26, VII Moore N. S. 263.

² Calcutta, 1857 June 15, XI Moore 76.

³ Bengal, 1837 Feb. 10, I Moore 404.

RESTORATION OF

appeal because the court below had consolidated it with another appeal in the same cause, which was still pending.

*In re MUTTY V. RAJAH ROY*¹

156. Leave given to restore an appeal dismissed for want of prosecution, the transcript having been received in England only after the expiration of a year and day from the time of the allowance of the appeal, and the respondent having, in consequence thereof, obtained an order of dismissal. Diligence on the part of appellant was shewn.

GUDADIHUR PURSHAD TEWASSEE V. MOOSUMAT SOONDERKOOMANEE²

157. Appeal restored after being dismissed for want of effectual prosecution within the time limited by the fifth rule of the Order in Council of the 13th of June 1853; the new rules having been only recently adopted by the Sudder court of *Calcutta*, and the appellant in ignorance of their existence, being engaged in taking steps to prosecute the appeal within the time and according to the practice previously existing.

SETO LUCHMEECHUND V. SETO ZORAWUR MULL³

158. Appeal from the Sudder court, in *India*, which stood dismissed under Rule 5 of the Order in Council of the 13th June 1853, for want of effectual prosecution, restored, as the appellant was in ignorance of the existence of the new Rules.

159. Where government securities for the due prosecuting of the appeal and costs were deposited in the registry of the Sudder court, the Judicial Committee in restoring the appeal dispensed with the usual recognizance in England.

RANEE HURROOSONDREE DEBLAH V. RAJAH PRAN KISHEN SING⁴

160. In circumstances showing conflicting and opposite decisions by the Sudder court upon the same question at issue, between the same parties, an appeal treated under the Statute 8th and 9th Vict., ch. 30, sec. 2, as abandoned for non-prosecution, was restored upon terms of paying costs and undertaking to lodge cases forthwith, and to lodge security or a bond in *England*, to the amount of £500.

161. Where an appeal has been treated as abandoned by

¹ Bengal, 1839 Feb. 12, III Moore 11.

² Calcutta, 1854 June 29, IX Moore 86.

³ Agra, 1854 Nov. 30, IX Moore 351.

⁴ Bengal, 1857 May 9, XI Moore 152.

RESTORATION OF

statute above cited, their Lordships have no power to grant leave to institute a new appeal; they only have a discretion to allow the original appeal to be restored.

RANEE HURROSOONDREE DIBIAH V. RAJAH PRAN KIRSHEN SING¹

162. Restoration of an appeal allowed, upon condition of the appellant lodging in *England* security for costs of the appeal. Six months after, the respondent applied to dismiss the appeal by reason of the non-performance of the condition. As it appeared that the appellant's agent was in daily expectation of funds from *India*, the case was, upon the appellant paying costs of the day, ordered to stand over for three months, for the appellant to perform that condition; on failure thereof, the appeal to stand dismissed.

RANEE BIRJOBUTTEE V. PERTAUB SING²

163. This appeal had been dismissed for want of prosecution and was restored under circumstances showing that the interest of infants was materially affected, but upon condition that the appeal should be prosecuted within a given time, the appellant paying the costs of the application and giving fresh security. However, their Lordships said that they did not mean to go the length of saying that where infants are concerned, any degree of delay may be considered justifiable or excusable, or such as may be passed over; as there may be circumstances so strong as to prevent infancy from being an apology or an excuse.

See APPEAL: *time for appealing*.

SECURITY IN

CAMBERNON V. EGROIGNARD.³

164. The court below is the sole judge of the sufficiency of the security to be given for the due prosecution of an appeal. Where that court has refused to allow an appeal on account of the insufficiency of the security tendered, the Privy Council will not allow one to be instituted. *See* remarks of *Lord Brougham*, III Moore 26.

CRAIG V. SHAND⁴

165. An appeal was noted on the 2nd day of May and the petition was presented on the 15th. On the 14th day of the same month, the mode of giving security was changed by

¹ Bengal, 1857 Dec. 7, XI Moore 304.

² Calcutta, 1860 June 15, XIII Moore 465.

³ Mauritius, 1830 Feb. 20, I Knapp 251.

⁴ Demerara, 1830 Feb. 20, I Knapp 253.

SECURITY IN

the proper authorities, the proclamation to take effect from the 18th. It was held by the Judicial Committee that this appeal should be prosecuted according to the previous practice.

POWELL V. WASHBURN ¹

166. The appellant, as security in appeal, tendered his own bond which was, upon a rule to show cause duly allowed. Pending the appeal, the appellant died, and the appeal was duly revived against the executors. Application that the executors should give proper and sufficient security, or the appeal stand dismissed, was refused, the Judicial Committee being of opinion that the allowance of the security in the court below precluded the respondents from objecting now to the form of the bond, and that their appearance to the order of revivor prevented the court imposing terms on the appellant.

MR. BARON PARKE, p. 204: — By the term "proper security," used in the Canada Act, 34 Geo. III, c. 2, s. 35, and which provides for appeals to this Court, we should certainly understand security with proper sureties. Now there is neither surety nor principal to the bond in the event that has happened, viz., the death of the obligor, as he alone was liable to the penalties. The court below and the appellant, however, were satisfied with the instrument in that form; for it appears that a rule *nisi* to show cause why the security so tendered should not be allowed, was granted, served on the respondent, and subsequently made absolute. It is too late now therefore to question the propriety of the terms of the bond. The proper course to have taken, would have been to have moved to dismiss the appeal upon the death of the appellant, when we could have imposed terms; but the appearance to the order of revivor precludes that course now, and we must dismiss this petition.

INGLIS V. DE BARNARD ²

167. Appeal allowed though the security for prosecuting the same had not been perfected in due time, such omission being occasioned by the suspension and removal of the judges in the colony, and the imperfect constitution of the court in consequence thereof.

HULM V. HULM ³

168. The security to be given in appeal to Her Majesty cannot be arbitrary fixed by the court below.

169. Where in an appeal from a sentence in a suit for divorce *à vinculo*, the Supreme Court, at *Mauritius*, had fixed

¹ Upper Canada, 1838 Dec. 14, II Moore 199.

² St. Lucia, 1841 June 20, III Moore 425.

³ Mauritius, 1843 June 16, IV Moore 262.

SECURITY IN

the security at £2,100, the Judicial Committee reduced it to £300 for costs below and in appeal.

In re GEORGE BARNETT ¹

170. Leave to appeal was granted although there was an intermediate court of Error in the colony, where the judgment might have been brought on appeal. Their Lordships allowed the appeal on special grounds and on the applicant giving security.

THE ATTORNEY GENERAL OF THE ISLE OF MAN *v.* COWLEY ²

171. The Attorney General of the Isle of Man, as the chief law officer of the Crown in the Island, is not required, in an appeal to the Queen in Council, to give security for costs of appeal.

RANEE BIRJOBUTTEE *v.* PERTAUB SING ³

172. Where an appeal is dismissed for want of prosecution the security entered into in the court below is vacated, and upon the restoration of the appeal, fresh security will be required to be given in *England*.

BOSNELL *v.* KILBORN ⁴

173. Upon petition of the respondent, the sum ordered to be deposited for security for respondent's costs, was increased, on account of the length of the transcript of the proceedings in the court below.

ROBERTSON *v.* DUMARESQUE ⁵

174. Leave to appeal was granted to the Government of the colony on a matter of Petition of Right without giving security for costs.

In re THE ATTORNEY GENERAL FOR VICTORIA ⁶

175. Leave to appeal in several actions in the nature of Petition of Right against the Crown was granted to the Attorney General of Victoria, without the necessity of giving security, provided all the appeals be consolidated into one.

WEBSTER *v.* POWER ⁷

176. By an order of the Supreme court leave to appeal was allowed on condition of giving security within three

¹ Jamaica, 1844 Nov. 29, IV Moore 453.

² Isle of Man, 1859 June 30, XII Moore 27.

³ Calcutta, 1860 June 15, XIII Moore 465.

⁴ Lower Canada, 1860 June 15, XIII Moore 476.

⁵ New South Wales, 1864 Feb. 6, II Moore N. S. 80.

⁶ Victoria, 1866 June 16, III Moore N. S. 527.

⁷ Victoria, 1866 June 18, III Moore N. S. 531.

SECURITY IN

months. The appellants at first offered to deposit money to the amount required, but afterwards a security Bond was approved by the Master of the court, and, without objection by the defendants, fyled as of record; but in consequence of objections afterwards taken by the defendants' solicitors to the competency of the proposed sureties, the Bond was not fyled within three months. Upon a motion by the defendants to set aside the leave to appeal upon that ground, the Supreme court made an order revoking the leave given.

In such circumstances their Lordships upon petition, gave special leave to appeal on security being given.

SPECIAL APPLICATIONS TO

EAST INDIA CO. V. ALLY ¹

177. Where a party has lost his right of appealing according to the charter of a court below, through the erroneous construction of it by that court, the Privy Council will, upon special petition, grant leave to appeal.

SIEMENS V. THE HEIRS OF BUFE ²

178. An appeal was allowed from a sentence of the Lieutenant Governor of the Island of *Heligoland*, the sentence having been passed without hearing the appellant's case.

179. Execution of sentence ordering a distribution of the property in dispute ordered to be stayed, pending the appeal, and security ordered to be given.

Ex parte KENSINGTON ³

180. No leave of appeal will be granted when the petition shows merely grounds of a technical character, and not affecting the merits.

SPEARMAN V. THE EAST INDIA RAILWAY COMPANY ⁴

181. The sum claimed was under the appealable value. The questions for decision depended upon the special contract for the sale of the coals and the facts of the case. Under those circumstances leave so appeal was refused.

LYALL V. JARDINE ⁵

182. Where, on the evidence submitted to the court below, the order was properly made, no appeal will lie on

¹ Madras, 1820 May 22, 1 Knapp 331 Note.

² Heligoland, 1856 July 26, XI Moore 62.

³ Leeward Islands, 1863 June 18, XV Moore 209.

⁴ Bengal, 1869 Feb. 22, XX Law Times N. S. 501.

⁵ Hong Kong, 1870 July 7, VII Moore N. S. 116.

SPECIAL APPLICATIONS TO

the ground that facts existed which would, if known to that court, have led to a different order being made, those facts not having been submitted to the court.

*In re SKINNER*¹

183. Special leave to appeal allowed from an Order of the High court of judicature by which a minor was taken from the custody of her mother, a Mahomedan, on the ground, that the minor's deceased father had been a professed Christian, and her mother, who was, as the court held, living in adultery, was inducing her daughter to adopt the faith and habits of a Mahomedan. The right of the mother to see her daughter at suitable times was reserved to be regulated by the court below.

THE SPEAKER OF THE LEGISLATIVE ASSEMBLY OF VICTORIA
V. GLASS²

184. Special leave to appeal granted on the ground, that the question raised was one of public interest, involving the constitutional rights of a colonial assembly. On reversing the order of the court below no costs were given, as the appeal was only allowed to decide the abstract question.

CREDIT FONCIER OF ENGLAND V. AMY; AND BAILY V. AMY³

185. The liquidation of an insolvent bank was referred to a *juge commissaire* by the Royal court to ascertain the claims under the colonial Act of 1867. The claim of appellant Baily was fixed at £56,606, and, subsequently on the report of the *commissaire* an act of composition between the bank and its creditors was confirmed.

Leave to appeal was granted to the bank and Baily; the appeal to be limited to certain points determined by their Lordships.

JOHNSON V. THE MINISTER AND TRUSTEES OF ST. ANDREW'S CHURCH,
MONTREAL⁴

186. The amount at issue was under the appealable value, the object of the appeal was the construction and effect of private contract for the occupation of a pew in a church. Leave to appeal refused.

¹ India, 1870 Dec. 5, VII Moore N. S. 296.

² Victoria, 1871 Jan. 3, VII Moore. N. S. 450.

³ Jersey, 1874 Dec. 8, L. R. VI P. C. 146.

⁴ S. C. Quebec, 1877 Feb. 10, L. R. III Appeal Cases 159.

SPECIAL APPLICATIONS TO

MOLSON V. CARTER ¹

187. Their Lordships will not, according to their usual practice, grant special leave to appeal unless they see clearly that there had been some miscarriage in point of law, or very gross miscarriage in the two courts, whose concurrent judgments are under appeal, on the matters of fact.

PRINCE V. GAGNON ²

188. No appeal to the Privy Council will be admitted from the Supreme court of Canada except in causes "of gravity, involving matter of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character."

Appeal refused, although it was a case of disputed facts whether a deed of £1000 was a sale or a gift.

See APPEAL: *in election cases.*

THE MONTREAL CITY PASSENGER RAILWAY V. PARKER ³

189. The appellant was condemned by the Superior court to pay a sum of money to the respondent for damages done to him by the rails of the company being in bad order. The court of Appeal reversed the judgment and dismissed the action, and the Supreme court found for the plaintiff and reversed the judgment of the court of Queen's Bench.

The Judicial Committee refused special leave to appeal on the ground that the case depended on a question of fact.

The whole report is given here as it illustrates the judgment of their Lordships:

Mr. *Jeune* said the action was brought for personal injuries against the Montreal City Passenger Railway company. The cause of action was that the respondent was travelling in a wagon through the streets of Montreal, and across the track of the railway, and the waggon in which he was, caught the rail in some manner and he was thrown out of it.

LORD FITZGERALD.—Is there any question of amount?

Mr. *Jeune*.—No, my lord. The question is one of law, and of considerable importance to the railways in Canada. That is the proposition which I shall have to contend for, and what I wish to show is this, that the learned judge of the court below in the first instance never decided the case on the facts at all, but decided it on what I submit is clearly an erroneous principle of law of very considerable

¹ Quebec, 1880 Nov. 27.

² S. C. Canada, 1882 Nov. 25, L. R. VIII Appeal Cases 103.

³ S. C. Quebec, 1885 Nov. 19.

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importance indeed. What he held was that this company, being governed by a by-law and by a provision of an act of Parliament the by-law must prevail. The by-law provided that the railway shall be liable for accidents caused by the obstruction made by placing the rails in the streets, and the act of parliament provided that the rails should be laid down in a particular way. The view of the railway company (and on which they have acted) is this: That if they make their railway through the streets according to the provision of an act of Parliament they are not liable for accidents caused by their rails being so constructed, and that the provision in the by-law which makes them liable in all cases practically is subjected to the express provision of the act of Parliament, which says that they must lay down their rails in a particular way. If they do lay down their rails in that way they are not liable for the rails being so laid down. That is why I say the court of first instance decided wrongly in holding that the company was liable for the accident caused apart from negligence. The learned judge did not decide on the real facts at all, that is to say, on the question of negligence on the part of the defendants, but he decided it on an erroneous principle of law. Then the case went to the court of Appeal, and there they decided the facts by four to one in favor of the railway company that there was no negligence. It then went to the Supreme court, which decided the question of fact the other way. It was a case of considerable hardship on the railway company, for the judge in the court of first instance heard the evidence and pronounced no opinion upon the facts, but went wrong in his law, and the court of Appeal on that decided by a majority of four to one on the facts in favor of the company, and then the Supreme court reversed that judgment on the facts also by a majority of four to one. Opinion is equally divided among the judges, and there still remains the question in which the judge of the first court was clearly wrong, viz., that under the codes of this by-law and this act of Parliament, the railways in Canada are liable. I shall submit that the decision is clearly erroneous.

SIR BARNES PEACOCK.—But it is very hard on the plaintiff to do battle on behalf of the public.

Mr. *Jeune*.—I say that there is no negligence on the part of the railway company.

SIR B. PEACOCK.—But the Supreme Court have found that there was.

Mr. *Jeune*.—But the same number of judges have found that there was not. The learned counsel then called attention to the principle of the thing. The by-law was a by-law of the City of Montreal—"And the said company shall be liable for damages arising either from the construction of the railway or from the works they shall cause to be laid down in the streets." Then there was an act of the Legislature which provided that the rails of the company should be raised flush with the streets and the highways, and that the railway track should conform with the same, so as to offer the least impediment to the ordinary traffic, and that the ordinary vehicles might use the same tracks, provided that they did not interfere

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with the cars of the company. The by-law says that "you shall be liable for all damages arising from the construction of the railway or of the works which cause it;" yet Parliament says: "You shall make your railway in a particular manner." The court of first instance held in effect that on the by-law they were liable, apart from any question of whether they made the railway according to the act of Parliament or not; but inasmuch as the by-law said they were liable in all cases whether their rails were made properly or not, they entirely ignored the effect of the Dominion Act and treated the corporation by-law alone as law. I say that is bad law.

LORD MONKSWELL.—The Supreme court held that there was evidence of negligence. They took a different view of the evidence from the court of the province.

Mr. Jeune.—As regards four judges they say "You are right. The railway company are not liable if they lay their railway in accordance with section 5, and in this case we say that it was not laid according to section 5."

LORD HOBHOUSE.—They were overruled.

Mr. Jeune.—Yes, they held on the facts in favor of the company. When they came to the Supreme court they took a different view, and they held that there was negligence on the part of the company in not laying their rails in accordance with the section.

SIR B. PEACOCK.—We should have to go into a question of fact as to this negligence. Is that a case on which we can advise Her Majesty?

Mr. Jeune.—I cannot dispute that if you decide the question of law then you must go into the facts.

SIR R. COUCH.—It seems to me very much a question of fact.

Mr. Jeune.—Well, the two courts below, with an equal number of judges, have taken a different view of the facts, and neither has heard the evidence of the witnesses.

SIR B. PEACOCK.—We should be in the same position as those courts. We should not have heard the evidence.

Mr. Jeune.—Just so.

Their lordships consulted, and

LORD FITZGERALD said:—Their Lordships are of opinion that there are not sufficient grounds in this case to recommend Her Majesty to allow the appeal.

ATTORNEY GENERAL OF NOVA SCOTIA V. GREGORY¹

190. Where by special agreement sanctioned by the court, the petitioner had come in and consented to be made a party to the cause in appeal, and to be bound by the order of the Supreme court to be made therein, but by the terms of the agreement the powers of the Supreme court were defined and restricted, and its order to be "considered a final disposition of all contentions whether now in litigation or not," the Supreme court in deciding the case was

¹ S. C. Canada. 1886 April 3, L. R. XI Appeal Cases 229.

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acting under the terms of a special reference and not in its jurisdiction as a court of appeal. Special leave to appeal refused.

DUMOULIN V. LANGTRY ¹

191. Special leave to appeal will not be granted on the ground that the questions raised are of great importance to the parties, or have attracted public attention, when there is no general principle of law involved, and especially when the appellant has appealed to the Supreme court, in Canada.

ALLAN V. PRATT ²

192. Leave to appeal refused, the poverty of the respondent being taken into consideration.

THE EARL OF SELBORNE, p. 782: — No doubt there may be cases in which the importance of the general question of law involved may induce their Lordships to give leave to appeal, though the value of the matter in dispute is not sufficient; but their Lordships must be governed in the exercise of that discretion by a consideration of all the circumstances of each particular case. In this case they see from the manner in which it comes before them that this general question of law, if allowed to be argued on appeal, would be argued at the expense, if he did appear and go to any expense, of a man evidently too poor to undertake it and, secondly, they see that there would be no probability whatever, if they permitted such an appeal, of their Lordships having the assistance which they must necessarily desire, whenever an important question as to the construction of an article of the Civil Code, having so large a bearing as this is suggested to have, may require to be considered and determined by them.

LA CITÉ DE MONTRÉAL V. LES ECCLÉSIASTIQUES DU SÉMINAIRE
DE ST. SULPICE DE MONTRÉAL ³

193. Petition for special leave to appeal from a judgment of the Supreme court of Canada exempting the respondents from payment of a tax specially assessed by the appellant corporation, refused; the exemption being under statute which the judgment did not appear to have construed erroneously.

LORD WATSON, p. 662: — It is the duty of their Lordships to advise Her Majesty in the exercise of her prerogative, and in the discharge of that duty they are bound to apply their judicial discretion to the particular facts and circumstances of each case as presented to them. In forming an opinion as to the propriety of

¹ Quebec, 1887 June 18, LVII Law Times N. S. 317.

² Quebec, 1888 July 26, L. R. XIII Appeal Cases 782.

³ S. C. Canada 1889, July 27, L. R. XIV Appeal Cases 180.

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allowing an appeal, they must necessarily rely to a very great extent upon the statements contained in the petition with regard to the import and effect of judgment complained of, and the reasons therein alleged for treating it as an exceptional one, and permitting it to be brought under review. Experience has shewn that great caution is required in accepting these reasons when they are not fully substantiated, or do not appear to be *primâ facie* established by reference to the petitioner's statement of the main facts of the case, and the questions of law to which these give rise. Cases vary so widely in their circumstances that the principles upon which an appeal ought to be allowed do not admit of anything approaching to exhaustive definition. No rule can be laid down which would not necessarily be subject to future qualification, and an attempt to formulate any such rule might therefore prove misleading. In some cases, as in *Prince v. Gagnon*¹, their Lordships have had occasion to indicate certain particulars, the absence of which will have a strong influence in inducing them to advise that leave should not be given, but it by no means follows that leave will be recommended in all cases in which these features occur. A case may be of a substantial character, may involve matter of great public interest, and may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right, or at least to be unattended with sufficient doubt to justify their Lordships in advising Her Majesty to grant leave to appeal.

TIME FOR APPEALING.**PRESIDENT AND MEMBERS OF ORPHAN BOARDS V. VAN RESNEN**²

194. It is not necessary that the petition for leave to appeal should be presented to the King in Council within a year after leave to appeal has been refused by the court below, but once granted the appeal will be dismissed if not prosecuted within a reasonable time.

LORD WYNFORD, p. 93:—There is an established rule, that if an appeal be granted the party must bring that appeal to a hearing within one year, unless he obtains further time for the prosecution of it from this Board, and the respondent may call upon us to dismiss the appeal on account of the delay in presenting it. This rule has never yet been extended to a case where the appeal has been refused by the colonial court. It is to be hoped that appeals will rarely, if ever, be refused to parties who have any pretence of interest. The King is anxious that complete justice should be done to all the inhabitants of the provinces belonging to his empire, and has directed the Governors of those provinces to allow appeals to himself in council. Should, however, a case occur in which an appeal has been refused, and the party has neglected to follow up the appeal allowed on petition to the King for an unreasonable time, we shall feel it our duty to recommend his Majesty to dismiss it.

¹ See above.

² Cape of Good Hope, 1829 July 17, I Knapp 83.

TIME FOR APPEALING.

MUTER V. CHIPCHASE¹

195. By the colonial statute of the Island of St. Lucia, the delay for appealing from any decree or sentence from the court of Admiralty is limited to twelve months. The question was whether the Judicial Committee had the power to extend the time for appeal, the case was a proper case to exercise their Lordships' discretion.

MR. BARON PARKE, p. 23 :—All their Lordships are of opinion that they are concluded by the section of the act referred to, unless the conditions there specified have been complied with.

ST. LOUIS V. ST. LOUIS²

196. By the "Judicature Act" in Lower Canada, it was enacted that in all cases where an appeal is allowed by law to the Privy Council, it must be lodged within one year from the date of the judgment of the court below, and further that within fifteen months immediately after the allowance of the appeal, the appellant shall file in the court of Appeal of the province, a certificate signed by the clerk of the Privy Council that such appeal has been lodged and proceedings had thereon. The appellants having neglected to bring their appeal and filed their certificate within the delay prescribed, the respondent petitioned for the dismissal of the appeal. Their Lordships held that the rule limiting the period of appeal in the Privy Council to a year and a day, though usually adhered to is not imperative.

197. The party complaining of delay should not himself lie by and be guilty of delay; if he does so, he has no claim to be heard. The appeal may be allowed to proceed on sufficient causes shown.

LAING V. INGRAM³

198. Leave to appeal against a decision pronounced in 1819, and in which no step had been taken for two years, previous to the application, refused.

LORD BROUGHAM, p. 27 :—Their Lordships are all of opinion that this application is too late. It is not a question of the sufficiency of the security offered in the court below; of that, that court would be the sole judge: *Camberton v. Egroignard*, (1 Knapp, P. C. Cases, 251), but whether, two years having elapsed without any proceeding being taken, the Crown shall now be let in to dispute a decision pronounced in 1819. There is no greater right in the Crown, in a

¹ St. Lucia, 1836 May 30, 1 Moore 1.

² Lower Canada, 1836 Nov. 29, 1 Moore 143.

³ Mauritius, 1839 Dec. 5, 111 Moore 26.

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general case involving its interests, to come in after such a delay, than there would be in any ordinary subject. The question involved is certainly one of great importance, but it may be raised in another case; it is too late to re-open this.

HENDERSON V. HENDERSON ¹

199. In Newfoundland, an appeal to the Privy Council must be taken within fourteen days from the final judgment.

200. In a case where the party appealing was resident in England, had no representative in the colony, and was informed of the decree after the expiration of the delay, leave of appeal was granted.

THE QUEEN V. JOZE ALVES DIAS. THE "AQUILA" ²

201. Appeal from a judgment of the Vice-Admiralty Court of St. Helena must be taken within fifteen days from the judgment. On a petition from the proctor of seisor under the Slave Trade Act for leave of appeal the appeal not having been taken within the proper delay on account of the proctor's ignorance of the rule, leave was given, subject to a counter-petition in contestation. Upon the presentation of such counter-petition leave of appeal was cancelled the ground not appearing sufficient.

In re MUSHADEE MAHOMED CAZUM SHERAZEE ³

202. Although the judgment of the court below had been partially carried into execution, and the time for appealing had expired, leave of appeal was granted, but on condition of not disturbing the possession or title of the purchasers of the real estate sold under the authority of the judgment, of giving security for costs, and of abiding by any further order of the Committee.

In re SARCHET ⁴

203. After a delay of six years from the date of the judgments of the court below, the Judicial Committee refused to grant leave to appeal, no sufficient explanation being given to account for the petitioner's laches.

GRAHAM V. BERRY ⁵

204. The question was one of construction of statute and of public interest, and leave to appeal was granted, although the time for appealing had expired.

¹ Newfoundland, 1843 June 16, IV Moore 259.

² V. A. St. Helena, 1849 June 22, VI Moore 102.

³ Bombay, 1852 April 24, VII Moore 391.

⁴ Guernsey, 1857 July 21, X Moore 533.

⁵ N. S. Wales, 1865 March 14, III Moore N. S. 208.

TIME FOR APPEALING.

THE "MEANDER" ¹

205. Although admitting the necessity of adhering to the delay fixed by the rules for appealing to the Judicial Committee, this latter is not bound by them and will grant leave to appeal whenever the administration of justice may require it.

LORD CHELMSFORD, p. 45:—It is desirable to adhere with some strictness to the rules which have been established for limiting the time of appealing upon the various matters brought before this Court; but their Lordships are always ready to grant an indulgent relaxation of them where justice appears to them to demand it, and they are not restrained either by statutory authority or by peremptory practice.

CASANOVA V. THE QUEEN. THE "RICARDO SCHMIDT" ²

206. The reason why the appellant did not lodge his appeal within the delay was that he was waiting until a similar case, the "Laura," which was then before the Judicial Committee, had been decided. Leave to appeal granted on giving security and paying the present application.

THE "BRINHILDA" ³

207. According to the 25th Rule of the Admiralty court, under order in Council of 27th June 1832, the time for appealing from any decree of Vice-admiralty courts, is limited to "fifteen days after the date of the decree."

Held, that these words do not mean after the date when the decree is drawn up in writing, but after the date on which the decree or sentence is pronounced by the Vice-admiralty court. ⁴

APPEARANCE

See PRACTICE: *eodem verbo*.

APPROPRIATION

See PAYMENT: *imputation*.

ARBITRATOR

POWERS OF

BOURGOIN V. LA CIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA ET OCCIDENTAL ⁵

208. Under the "Railway Act, 1868, an award by arbitrators giving to an expropriated party, as compensation for

¹ Admiralty, 1862 July 16, 1 Moore N. S. 45. 389.

² Admiralty, 1866 Feb. 12, 12 Jur. N. S. 127.

³ V. Admiralty, 1881 March 15, XLV Law Times N. S.

⁴ See *The Vice-Admiralty Courts Act* 1863, 26 Vict. ch. 24 and its amendments by 30 & 31 Vict. ch. 45, and *Williams and Bruce*, Adm. Practice, p. 313. See also *The Colonial Courts of Admiralty Act* 1890, 53 & 54 Vict. ch. 27.

⁵ Quebec, 1880 Feb. 26, L. R. V Appeal Cases 381.

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land and all other damages, the sum of \$35,013, *plus* \$100 per month from date payable on the first of each month, until the Company expropriating shall have set free a certain watercourse serving to drain a quarry adjacent to the expropriated land, and shall have constructed a culvert to protect the said watercourse, is invalid upon the face of it:

1o. "Because it was not competent to the arbitrators to impose the payment of a rent or periodical sum at all...."
"It is the duty of the arbitrators to fix as compensation such a gross sum or sums as would be capable of being paid or tendered at once to the parties entitled to the same"; in fact their award was in the nature of an assessment of damages payable *in futuro*.

2o. Because the award makes the monthly payment contingent on the completion and erection of certain works, and then introduces an element of uncertainty which would of itself be a fatal objection to the award.

3o. Because it gives direction to the Company to restore the watercourse in a particular manner, by the construction of a culvert.

P. 393:—"It is not within the functions of the arbitrators to prescribe how the company was to relieve itself from its obligation, or to cast upon them the construction of a culvert which possibly might not be necessary."

209. It was also held that the objectionable part of the award was not severable from the part allowing to the appellants the sum of \$35,013.

SIR JAMES W. COLVILLE, p. 530:—The material passage in the award, upon which the whole question turns, is that whereby the arbitrators, after stating that they had proceeded to assess the compensation to be paid by the Company to the appellants for the piece of land described, and for all the damages resulting from the taking possession of the same, and had visited the said piece of land, and estimated with care and established the value of it, and the amount of the said damages, proceeded to award:—

"The sum of \$35,013, *plus* \$100 per month from this date, payable on the first of each month, until the said Company shall have set free the watercourse serving to drain the quarries adjacent to the expropriated land, and constructed a culvert to protect the said watercourse, as being the amount of compensation to be paid by the said Montreal Northern Colonization Railway Company, now called "the Montreal, Ottawa, and Western Railway Company," to the said "Bourgoin et Fils" and "Bourgoin and Lamontagne" for the said piece of land, and for all the damages resulting from the possession of the same."

The objection taken to the award is now confined to that portion of the passage just quoted, which includes and follows the word

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"plus," and relates to what the arbitrators seem to have considered as wholly or in part the compensation due to the appellants in respect of that portion of their claim which was comprehended in the words of its 4th head, and claimed damages for the watercourse diverted by the Company, and for pumping and work to be done at the rate of \$600 per annum for eight years (which they treated as the probable duration of their lease,) and amounting to a gross sum of \$4,800. Their Lordships, after full consideration of this case, and of the learned arguments upon it, have come to the conclusion that, in respect of the passage in question, the award is bad upon the face of it. The case of the appellants was very ingeniously put, particularly by Mr. Fullarton. His argument was to this effect. He said that the arbitrators probably conceived that, if they gave that full sum claimed on the assumption that the interruption of the drainage would last for the whole duration of lease, fixed at eight years, they might be doing great injustice to the Company; that by virtue of the 6th sub-section of the 7th section of "the Railway Act, 1868," which is in these words:—

"To construct, maintain, and work the railway across, along, or upon any stream of water, watercourse, canal, highway, or railway, which it intersects or touches; but the stream, watercourse, highway, canal, or railway so intersected or touched shall be restored by the Company to its former state, or to such a state as not to impair its usefulness."

The Company was, to the knowledge of the arbitrators, under a statutory obligation to restore the watercourse; that they assumed that the Company would perform that statutory obligation as soon as possible; and accordingly assessed the damages in the manner complained of in case and for the supposed benefit of the Company; and further, that it was competent to them so to do.

The motives of the arbitrators, whatever they may have been, cannot validate their act if that were *ultra vires*. And the first observation which their Lordships have to make is that, as they read the statute, it was not competent to the arbitrators to impose the payment of a rent or periodical sum at all. The word "rent," no doubt, occurs in several of the sub-sections of section 9; but their Lordships think that the use of that word is always to be explained by reference to the provisions contained in the sub-sections, 3, 4, and 8, and that in every case, except those in which the parties expropriated fall within the description of "corporations or persons who cannot in common course of law sell or alienate the lands set out and ascertained," it is the duty of the arbitrators to fix as compensation, such a gross sum or sums as would be capable of being paid or tendered at once to the parties entitled to the same under the 27th sub-section, or into Court under the 34th sub-section, of the 9th section of the Act, in order to entitle the Company to possession under the 27th, or to a confirmation of title under the 34th and 35th sub-sections. It appears, moreover, to their Lordships, that even if a rent charge could be given by way of compensation in circumstances like these to the expropriated parties, it has not been done in this case; that the monthly sum awarded is not in any sense of the

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term, a rent; that it is more in the nature of an assessment of damages payable *in futuro*, and does not in any point of view fall within the provisions of the Act.

A further objection to this part of the award is, that it makes the monthly payment contingent on the completion and erection of certain works, and thus introduces an element of uncertainty which would of itself be a fatal objection to the award. That it is open to the objection of uncertainty is shown by the observations which have been quoted from the judgment of Mr. Justice Tessier, who decided in favour of the appellants. The learned Judge, p. 403, line 20, assumes that if the culvert is not constructed the annual sum will continue to be payable, not only to the appellants and their assigns, but to the reversioner, Mrs. Smith. The learned Counsel for the appellants repudiated that construction; but the fact that it was put by the learned Judge upon the document goes to prove that there is some degree of uncertainty in the award. Again, the duration of the appellant's interest is uncertain, in that they held their lease with the power of renewing it so long as any stone remained to be worked. They might thus prolong the time during which the monthly sum would be payable, by omitting to work the stone, although no doubt the Company would have the power to put it an end to their liability by doing the works prescribed.

Lastly, there seems to their Lordships to be a fatal objection to the award in the direction to the Company to restore the watercourse in a particular manner, and that by the construction of a culvert. They conceive that it was not within the functions of the arbitrators to prescribe how the company was to relieve itself from the statutory obligation imposed upon it by the 6th sub-section of the 7th section, or to cast upon them the construction of a culvert which possibly might not be necessary.

Their Lordships commented upon the following authorities: *Great Western Company v. Baby et al.*, 12 Q. B. *Ep. Can.* 166, 114, 121, 131; *Chemin de fer Grand Central v. Rebois, Sirey, Recueil Général* 1858, p. 831.

The only remaining question to be considered is one which was suggested in the course of the argument, viz., whether the objectionable part of the award is severable from that which awards to the appellant the sum of \$35,013, so that the appellant may recover that, waiving their right to the rest of the compensation awarded. The point was never taken in the Canadian Courts, no offer of waiver was made there, and it may be questionable whether that point can now, for the first time, be raised here. Assuming, however, that it is open to the appellants, their Lordships are of opinion that the award is not severable in the manner suggested, the compensation improperly awarded being combined as it is with that which was properly awarded, and both declared to be "le montant de la compensation à être payée, pour le dit morceau de terre, et pour tous les dommages résultant de la possession d'icelui." And if they were severed, a question might arise, as Mr. Benjamin has

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argued, whether the award would not be defective in that it failed to deal fully with one of the questions submitted to the arbitrators, viz., the amount of compensation due to the appellants under the fourth head of their claim.

AS AMIABLES COMPOSITEURS.

ROLLAND V. CASSIDY¹

210. Arbitrators who are also appointed *amiables compositeurs* may, under art. 1346 C. C. P., dispense with the strict observance of those rules of law, the non-observance of which as applied to awards results in no more than irregularity; but they cannot be arbitrary in their dealings with the parties or disregard all law.

However, when such arbitrators in good faith obtained from one of the parties in the absence, but to the knowledge of the other, correct information as to the law bearing upon the case before them, it was not an irregularity capable of vitiating the award.

THE EARL OF SELBORNE, p. 772:—Their Lordships would, no doubt, hesitate much before they held that to entitle arbitrators named as *amiables compositeurs* to disregard all law, and to be arbitrary in their dealings with the parties; but the distinction must have some reasonable effect given to it, and the least effect which can reasonably be given to the words is that they dispense with the strict observance of those rules of law the non-observance of which, as applied to awards, results in no more than irregularity.

ARCHITECT AND CONTRACTOR

RESPONSIBILITY OF

WARDLE V. BETHUNE²

211. The appellant, in 1859, undertook to do, in a workmanlike manner, all the works requisite to be done in building and completing a church, according to the plans and drawings made by an architect. The tender of the appellant for the contract was in the following terms:

"I undertake to provide all labor and materials required to build Christ Church Cathedral according to the drawings and specifications, etc, for £30,600, the above sum includes work already done in foundations which I value at £1,750; the contract settled the full price at £30,600, inclusive of one valuation of the work done, mentioned above."

The builder erected the cathedral in conformity with the contract, under the direction of the architect, and in a

¹ Quebec, 1888 June 9, L. R. XIII Appeal Cases 770.

² Quebec, 1871 Nov. 20, VIII Moore N. S. 223.

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workmanlike manner as agreed; but the tower of the cathedral, shortly after it was erected, and before the works were completed, sunk, and considerable damage was done. The cause of the sinking was found to be the unfitness of the soil and the insufficiency of the foundations. This defect, though not patent, might have been discovered by the builder of the cathedral, before making the contract.

The Judicial Committee held that the builder was responsible for the defect in the foundations and the sinking of the tower and was not freed from liability, either by acting under the directions and order of an architect employed by the proprietor, or by reason of the defective foundations being the work of the preceding builder, as he had assumed the work done without protest or objections.

SIR JOSEPH NAPIER, p. 249: — (*After reading the articles 1688 and 1869 of the Civil Code*).

The Code, it is true, did not come into operation until the 1st of August 1866, after the commencement of the action; but the articles referred to are declaratory, and, in part, expressly founded on the case of *Brown v. Laurie*,¹ which was decided in 1851 by the Superior Court at Montreal, affirmed on appeal by the Court of Queen's Bench in 1854, and has since been considered to be the leading case on this branch of Canadian law. Mr. Lloyd contended that this authority, although binding on the courts of Lower Canada, was open to review, and ought to be reviewed, by this board. But their Lordships are of opinion, that a case decided so long ago by judges eminently conversant with the law of the country, and that has since been incorporated into the Civil Code, is not open to be reviewed on this appeal.

It was an action on a contract for building seven houses in the city of Montreal, and a balance was claimed to be due on foot of the contract.

The defendant set up as defence, that the plaintiff not regarding his legal liability as master mason, did not excavate skilfully the foundations, more particularly those of the three centre houses, but laid them on a soft substance, so that the walls, when partly built, gave way. He then set up his claim for the consequential damage against the claim of the plaintiff. The special reply of the plaintiff was, that the contract bound him to the specifications, plans and drawings, and placed him under the direction of an architect in charge; that the depth of the excavation had been particularly marked out on the said plans and drawings, and had been executed exactly as thereby required; that when the excavation had been so made, a stratum of sand and clay had been found, which had been carefully examined by the defendant and the architect in charge, and by them declared sufficient; that thereupon the foundations had been laid; that it was true the three centre houses had sunk a

¹ 1 L. C. R. 343 S. C.; 5 L. C. R. 65 Q. B.

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little more than was usual, which was caused by a mossy earth under the sand and clay, of which there was no indication; but that there had been no want of skill on the part of the plaintiff, who had acted in accordance with the contract and the special orders of the defendant. The Court held that it was sufficiently shown that proper precautions had not been taken to ascertain the nature of the ground by probing or otherwise, but that taking it for granted that the soil was all of the same character, there had been an omission to ascertain the fact in the way it ought to have been ascertained.

The reason of the law as it was explained by Mr. Justice Day in giving judgment, is two-fold; first, that the employer, who is supposed to be unskilled, has a right to expect that the builder who contracts to build houses for him will provide that the foundation shall be such that the houses erected on it shall stand; 2ndly, "there is a motive of public policy which would subject the builder to this risk, and render it necessary that he should take extreme care in the construction of buildings." The ancient law of France is that which has prevailed in Lower Canada. Mr. Justice Day says, as to this law, that "on looking through the books anterior to the Code Napoleon the Court does not find any express warranty for what was called in that Code '*vices du sol*,' but the expression invariably made use of is, that the builder was bound to warrant the solidity of the building, which he could not do unless he warranted the solidity of the foundation, and therefore the one warranty must be held to include the other."

The Court decided that although the proprietor employs an architect to supervise and direct the work, and the builder follows his directions, this does not exonerate the builder from responsibility, but the law holds him jointly and severally bound with the architect; and "that the importance of guarding life and property makes this rule of law such as not to go beyond the strict bounds of reason." As the builder had not taken proper and available precautions, and the buildings proved unsound because of the insufficient foundation, he was held to be liable for the consequences.

The learned Judge (Rolland) who presided in the Court of Queen's Bench when the case came before it on appeal, adverts to the importance of establishing "a rule certain" for architects and builders, in the execution of works entrusted to them. He states that the "*ancien droit Français*" made all the responsibility for defaults to fall on the builder, and especially those that proceeded from the nature of the soil, because the builder was bound to know his art, and to make himself sure that the ground was sufficiently solid to sustain the buildings to be erected. The only restriction attached to this warranty was as to its duration, which was limited to ten years. The rules established by the new legislation in France, for deciding questions that might arise on this point, were not (he says) in force in Lower Canada. The old French authorities were abundantly cited in the argument, and considered by the Court.

Their Lordships are of opinion that the case of *Brown v. Laurie* is a conclusive authority against the proposition that the work having been done according to the terms of the contract and under the

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superintendence of an architect selected by the employer, the builder is exempted from the liability which would otherwise attach to him. It is therefore unnecessary to examine the French authorities on which the learned counsel for the appellant relied in order to establish this proposition, whether they are cases decided on the old law of France, or on article 1792 of the Code Napoléon, which (it may be observed) is not identical in its terms with article 1688 of the Civil Code of Canada.

It has, however, been argued on behalf of the appellant that, admitting the authority of *Brown v. Laurie* to its fullest extent, the case under appeal is not to be governed by it, inasmuch as the faulty construction in this case was in the foundation laid by Brown and Watson, and that the appellant cannot be held liable for the defects in their work. This is, in fact, the ground on which Mr. Justice Caron dissented from the judgment of the other Judges of the Court of Queen's Bench.

Their Lordships have not been altogether free from doubt on this point; but, after a full consideration of the learned and able arguments and of the authorities which have been adduced, they have come to the conclusion that the judgment under appeal is correct, and ought to be affirmed.

The broad general rule of law established by the case of *Brown v. Laurie* — "the rule certain for architects and builders in the execution of the work entrusted to them," is that there is annexed to the contract, by force of law, a warranty of the solidity of the building that it shall stand for ten years at least. It was not expressly decided whether this was to be taken as an absolute warranty, or with an implied exception of cases in which the building gives way, within the time, wholly or in part, from causes that could not have been discovered or removed by due vigilance and competent skill. But this at least was expressly decided that the approval and direction of a supervising architect, or his omission to ascertain the nature of the soil of the foundation, by known and available tests, does not exonerate the builder from the consequences of following such direction, or of building on the foundation without making himself sure of its sufficiency.

When there has been a breach of warranty of the stability of the building, the onus is on the builder to show that he is exempted from liability, by some exception in his favour. It is of primary importance that he should make sure of the sufficiency of the foundation on which he proceeds to build, for, without a sufficient foundation, the warranty could not be kept. It is an inseparable incident, an essential part of the warranty; the warranty of stability of the edifice includes, by necessary implication, the warranty of sufficiency of foundation; and such is the law as explained in *Brown v. Laurie*. The architect and builder are therefore bound to provide whatever is essential to the stability warranted.

The exemption from responsibility, on the part of the builder, for the breach of warranty, must be made out (if at all) by legal implication. There is not in the Code any express exception in favour of the builder; and there is none in his contract.

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The exemption for which the appellant contends is, in fact, that whether the foundation was altogether insufficient; whether it was constructed without the use of known and available tests for ascertaining the nature of the soil; whatever may have been the amount of negligence or want of skill in its construction, and however practicable for him, before he adopted it at his own estimate of its value as the basis of his building, to have ascertained that it was, in fact, insufficient (as it then stood) for such a purpose, yet he was in nowise concerned with the matter, and under no responsibility for the consequences of having upon this foundation erected the building which he had contracted to erect and complete, subject to the warranty of stability annexed by law. To sustain his contention it must be held that the warranty of sufficiency of foundation is not included in that of the stability of the building except in the case where the builder of the building is also the constructor of the foundation. But the sufficiency of the foundation is an inseparable incident to the stability warranted, and could not be the subject of an implied exception. The special responsibility for a breach of the warranty has been incurred by the builder, not as the constructor of an insufficient foundation, but because the stability of the edifice erected has in fact failed, and the failure has not been shown to have been excused by law. If it were otherwise, the law might be evaded by the contractor building only upon a foundation completed by another who was under no obligation to do more than to realize what the architect had designed, or even what the employer alone may have directed.

The French authorities relied on by the appellant, exclusive of such as are inconsistent with what has been decided in *Brown vs. Laurie*, or such as are under the Code Napoleon, may be reduced to those which Mr. Justice Caron has selected in support of his Judgment.

It is important, moreover, to keep in mind that the authorities which exonerate the builder from responsibility for a breach of the warranty, when he acts under the guidance of an architect, are set aside in *Brown vs. Laurie* on account of the importance of protecting property and life, which makes it strictly reasonable to maintain the responsibility of architect and builder alike. Accordingly, if the builder thinks fit to trust to the vigilance or skill of the architect, without the independent exercise of his own judgment, he acts at his own risk. He cannot escape from liability when he has omitted to use such known and proper precaution as he ought to have used if he had had the sole and undivided responsibility.

If, then, for the purpose of public safety, the builder cannot act upon the design and under the direction of the architect, except upon his own responsibility for the consequences, how can it be consistently maintained that he can, without incurring any such responsibility adopt and act upon the design of the foundation after it has been realized by the intervention of a third party who has been employed to do, and has done, nothing more than merely realize this design, in conformity with the direction of the architect or of the employer? If the public protection requires that the builder should not act upon

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the design in the first instance, except upon his own responsibility, it would seem to be not less requisite that he should not be exonerated from a like responsibility if, after it has been realized, he has estimated its value for the purposes of his contract, and adopted it as the basis upon which he erects the building which he has contracted to build, and the stability of which he is bound by law to warrant.

It is further to be observed, with reference to the French authorities, that not only are those to be excluded from consideration which proceed upon the opinion that the builder is not responsible when he follows the design or direction of a supervising architect, but also the distinction is to be noted which was well pointed out by Mr. Bompas in his able argument, between cases founded upon negligence in fact and those that depend simply upon a breach of the warranty of stability. There is a further distinction between the case of a head contractor who is the master builder, and that of particular sub-contractors, or distinct and separate workmen.

In the work of *Fremy-Ligneville*, to which Mr. Justice Caron refers, the head contractor is admitted to be equally responsible with the architect for "vices du sol" "La sureté publique" requires, he says, that they should be so responsible.

Whatever may be said as to "vices de construction" in buildings where separate constructors have been employed, and the responsibility of each of the constructors have been confined to his own separate part of the work, no authority has been referred to which shows that the contractor, who is the builder of the edifice, has been exempted from full responsibility, when it was practicable for him to have ascertained beforehand, by the use of known and available tests, a defect that affects the stability of the building which he has contracted to erect.

The case on which most reliance has been placed on behalf of the appellant is *Lambert's case*, reported in *Denisart's* collection of new decisions (Vol. iii page 313, ed. 1784.) In that case an architect prepared a plan of a house, which Lambert (a baker at Marseilles) approved. A mason contracted to build according to this plan. The building had been raised to the first story, under the supervision of the architect, who perceived the incapacity of the mason, and caused the contract to be rescinded, and a new agreement was made with another mason to finish the work. This mason, under the guidance of the architect, finished the work. The house soon after fell down. The public prosecutor instituted proceedings before the Judges of Police, who condemned the first mason to pay a fine of 1,000 livres, and suspended him for three years. They acquitted the architect.

The experts who first inspected the premises during these proceedings, reported that the walls of the foundation were not *à plomb*; that too soft stones had been used, and that the mortar was thin. A second set of experts added that the fall of the house was due exclusively to the fault of the first mason.

The second mason then sued the employer in the Civic Court of Marseilles for compensation for his work and labour, and also for damages for the loss of his tools, &c., which had been lost in the ruins. The employer cited the architect and the first mason in *garantie*.

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The Court condemned the employer to pay the second mason the amount due for his work, and also damage for the loss of his tools, and it also condemned the architect and the first mason to guarantee the owner from this condemnation, as well as from the damages suffered by him from the fall of the house.

The architect appealed against the sentence, which was confirmed by the Parliament of Aix (24th of May 1740), except as to the damages suffered from the fall of the house.

There is not a report of the arguments used, or of the reasons on which the judgment proceeded. The second mason, who was not employed to rebuild, but merely to finish the erection of the house, may not have been taken to be a builder of the edifice, subject to full responsibility within the meaning of the law of warranty. It was not shown that the default of the first mason was such as the second mason ought to have detected before he began to do his own work. The second report of the experts is rather to the contrary. The appeal was on behalf of the architect only; as all who were interested had been made parties to the proceedings, their equities, *inter se*, were adjusted according to the merits. The principal defaulter—the original contractor for building the house—was held responsible as well to the public as to the parties who suffered by his default.

No rule or principle of law can be safely collected from this Report, that could or ought to have been considered as authoritative in settling the law of Lower Canada otherwise than as it has been settled in the present case, in which the liability of the architect, or of Brown and Watson, has not been put in issue.

It is not necessary for their Lordships to consider what ought to have been the ruling of the Courts in Lower Canada, if the sinking of the tower, and the consequent damage, had been shown to have been caused by a latent defect in the work done before the date of the contract of the appellant and which he could not by the exercise of care and skill have discovered. It plainly appears that, when he contracted to build the Cathedral, and accepted the foundation at his own estimate of its value as the basis of his work, he had the means of knowing the nature of the soil; he had the dimensions of the foundation; he had the plans of the architect before him, and he must be taken to have known the nature and special character of the structure he was about to erect. Applying his scientific knowledge to the subject, he ought to have known that this foundation was insufficient. Their Lordships, therefore, are of opinion that under the law of Canada he is liable, just as he must have been if he had in terms contracted to build from the ground on the bare site.

The parties concerned have proceeded on what proved to be a common error, but this cannot alter the rule of law. To use the language of Lord Mansfield as to a rule somewhat analogous, "At first the rule appears to be hard, but it is settled on principles of policy, and when once established, every man contracts with reference to it, and there is no hardship at all." (3 Dougl. R. 390.) The contract here has been drawn up so as not to contain any express provision with a view to exclude or modify the full responsibility

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imposed by the law on the appellant. It superadds special clauses, protective of the employer, by which he is exonerated from contingent liabilities. The appellant must be assumed to have known the law when he entered into the contract. Whatever the hardship of the case may be, it is not within the province of their Lordships to relieve. Their duty is to decide what the law is by which the case must be governed. The principal point being thus decided against the appellant, they do not think it necessary to say more on the subordinate questions, and especially on that relating to the Caen stone, than that they agree with the Canadian Courts in their conclusion on these points, and in the reasons by which it is supported. Their Lordships will, therefore, humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal be dismissed with costs.

ASSESSMENT**EXEMPTION.**

MAYOR AND CORPORATION OF ESSENDEN V. BLACKWOOD ¹

212. In Victoria, lands the property of Her Majesty, which is unoccupied or used for public purposes, and lands in the occupation of the Crown or the Government of Victoria, are exempted from taxation.

213. A race course demised by the Crown to the respondent and successors in the office of chairman of the Victoria Racing club, for ninety-nine years, for the purpose of establishing there such a race course, does not fall under the above exemption, and is a rateable property.

MODE OF MUNICIPAL.

FAWCETT V. THE JUSTICES OF BOMBAY ²

214. By the statute 33 Geo. III, c. 52, s. 158, the town of *Bombay* has the right to make an assessment on the owners or occupiers of houses, buildings and grounds according to the true and real annual values thereof, for the making and repairing of streets of the town.

Under this law, the Quarter Sessions at *Bombay* made a roll in which was assessed the annual value of a cotton factory, having fixed machinery; the principle of this assessment was to impose the tax upon the gross receipts, after making an allowance for the disbursements and for the profits.

The Judicial Committee, quashing the roll, held that the assessment was made on an erroneous principle, the proper measure of rateable value of the building being not the gross receipt of the occupiers, but the rent that the building might reasonably be expected to be let for, to a yearly tenant.

¹ Victoria, 1877 May 14, L. R. II Appeal Cases 574.

² Bombay, 1845 June 20, V Moore 143.

MODE OF MUNICIPAL.LAWLESS V. SULLIVAN ¹

215. The tax imposed by 31 Vict. ch. 36, in New Brunswick, upon "income" must be levied on the balance of gain over loss made in the fiscal year, and where no such balance of gain has been made there is no income or fund which is capable of being assessed.

SIR MONTAGUE E. SMITH, p. 378:—It must always be borne in mind that the tax is imposed on the income received during the fiscal year, and what therefore has to be ascertained for the purpose of assessment is the income for an entire year. There can be no doubt that, in the natural and ordinary meaning of language, the income of a bank or trade for any given year would be understood to be the gain, if any, resulting from the balance of the profits and losses of the business in that year. That alone is the income which a commercial business produces and the proprietor can receive from it.

ON RAILWAYS.CORPORATION OF ST. JOHN V. CENTRAL VERMONT RY. CO. ²

216. According to the true construction of sections 323, 326 and 327 of Quebec "*Town Corporation General Act, 1876*," (40 Vict. c. 60), no part of a railway is made taxable property, except the land occupied by the road; the bridges or other superstructures thereon being excluded.

LORD WATSON, p. 591:—By the Quebec Act, 44 Vict., cap. 62, which amends and consolidates previous statutes relating to the incorporation of the town of St. John's, the appellant corporation is (Sect. 86) authorised to levy annually on all lands, town lots, and parts of town lots within the municipality, with the buildings and erections thereon, a sum not exceeding one half cent in the dollar on their whole real value as entered on the assessment roll of the town. Section 98 of the Act incorporates certain sections of "The Town Corporation General Clauses Act, 1876" (Statutes of Quebec, 40 Vict., cap. 60), including the three following clauses, upon the construction of which this appeal mainly depends:—

"323. It shall be the duty of the valuers in office to make annually, at the time and in the manner ordered by the Council, the valuation of the taxable property of the municipality, according to the real value."

"326. Every iron Railway Company or wooden Railway Company, other than those mentioned in the preceding section, and possessing real estate in the municipality, shall transmit to the office of the Council, in the month of May in each year, a return showing the actual value of their real estate in the municipality other than the road, and also the actual value of the land occupied by the road, estimated according to the average value of land in the locality.

¹ S. C. Canada, 1881 Feb. 22, L. R. 6 Appeal Cases 373.

² S. C. Canada, 1889 July 25, L. R. XIV Appeal Cases 590.

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"Such return must be communicated to the valuers by the Secretary-Treasurer in due time."

"327. The valuers, in making the valuation of the taxable property in the municipality, shall value the real estate of such Company according to the value specified in the return given by the Company.

"If such return has not been transmitted in the time prescribed, the valuation of all the immovable property belonging to the Company shall be made in the same manner as that of any other ratepayer."

The Central Vermont Railway Company, the respondent in this appeal, is the owner of a line of iron railway, part of which is within the municipal limits of the town of St. John's. The municipal boundary extends to the *medium flum* of the Richelieu, a navigable river, over which the respondent's railway is carried by a wooden bridge, some of its piers having their foundations in the *solum* of the river which, in so far as the interests of navigation are concerned, is subject to the legislative authority of the Dominion. The respondent Company did not, in any of the years from 1880 to 1884, both inclusive, make the return to the Council which is prescribed by Section 326 of the General Act; and, in each of these years, its real estate within the municipality was valued for the purposes of the assessment roll, by the official valuers of the town, in terms of Section 327.

For the year 1884 the entry made in the roll was in these terms:—

La Compagnie de Chemin de Fer de Central Vermont, étant pour la partie de son pont en bois dans les limites de la ville	\$12,000
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In each of the four years following, the valuation of the respondent's real estate within the boundaries of the town, as entered in the roll, included these two items:—

Railway tracks from East Longueuil Street to bridge.....	\$10,000
Part of railway bridge within limits of town of St. John...	\$10,000

The appellant Corporation annually imposed municipal assessments upon the basis of these valuations, no part of which has been paid by the respondent. In consequence of such default, a distress warrant was issued by the Corporation empowering a bailiff to distrain for the amount of the assessments in arrear, with interest.

The respondent Company, on the 18th December, 1884, made application to the Superior Court of the Province of Quebec for a writ of injunction ordering the Corporation to stay proceedings upon the warrant until further orders of the Court; and the 19th December a writ of injunction was issued by Chagnon, J., upon the applicant's giving security in terms of the Quebec Act in that behalf of 1878. On the 10th January, 1885, the Corporation filed a petition to quash the injunction, and after a variety of procedure, which it is unnecessary to detail, Chagnon, J., on the 10th March, 1885, gave judgment annulling the writ of injunction, with costs. On an appeal by the present respondent, the decision of the Superior Court was unanimously affirmed by the Court of Queen's Bench for the Province, consisting of Dorion, C. J., with Monk, Rafasay, Cross, and Baby, JJ.

The case was then carried by appeal to the Supreme Court of

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Canada, who, on the 20th June, 1887, reversed, by a majority of four against two, the judgments of both Courts below, found that the warrant and all proceedings following thereon were illegal and null, and ordered that the same should be set aside, and that a writ of injunction do issue out of the Superior Court for Lower Canada, enjoining the Corporation to desist from all proceedings to enforce the warrant.

Chief Justice Ritchie, with whose opinion Strong, Henry, and Gwynne, JJ., substantially agreed, stated the real controversy between the parties to be "whether or not anything more of the land "on which the superstructure of the railroad is placed can be assessed in addition to the land itself;" and on the construction of the clauses of the General Act already quoted, the learned Chief Justice was of opinion that "the Legislature has carefully protected railways "from any local assessment beyond the mere value of the land, apart "from, and independent of, the roadway with its superstructure."

The two Judges of the minority were Fournier and Taschereau, JJ. Fournier, J., does not, in his elaborate opinion, deal with the point which was said by the Chief Justice to constitute the real matter of controversy. Taschereau, J., on the contrary, states that the respondent attacked the warrant of distress on two grounds, the one affecting the whole assessment, and the other confined to the assessment for the year 1880. The learned Judge said, "The first, "which applies to all the taxes claimed on the part of the appellant's "road on *terra firma*, is that the land only occupied by the road is "taxable, and not the road itself." His reasons for coming to a different conclusion from that of the majority are thus expressed:—"We have been referred to the case of the *Great Western v. Rouse* " (15 U. C., Q. B., 168), in which it was held that only the land occupied by the railway and not the superstructure is taxable. But "this case has no application here, because the Statute of 1853, "Upper Canada Assessment Act, 16 Vict., cap. 182, sect. 21, does "not provide, as the Quebec Statute I have cited does, that if the "Company fails to make a return to the Council the valuation of all "its immovable property shall be made as that of any other rate-payer."

Her Majesty, in accordance with the advice of this Board, was pleased, by Order-in-Council dated the 17th December, 1887, to allow the present appellants to enter and prosecute an appeal against the judgment of the Supreme Court. In the petition for special leave, which is recited in the Order, the appellants set forth correctly the grounds upon which the learned Chief Justice, and the Judges who concurred with him, decided in favour of the present respondent, and then submitted, "that if the judgment of the Supreme Court, "contrary to the view of both Courts in the Province and to that of "the two French Judges in the Supreme Court, is correct, the power "of taxation of the municipalities in the Province of Quebec is greatly "limited, and that whether it is by law so limited is a question of "great and general importance."

Their Lordships would not have made any reference to these initial proceedings, had it not been that, at the hearing of the appeal, their time was chiefly occupied by an endeavour on the part of the

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appellant Corporation to argue that, as matter of fact, they had not, in any of the yearly rolls upon which these assessments were made, valued aught beyond the land occupied by the railway, and that they did not desire to include, and had not included, the bridge or other superstructures in the estimate. Their Lordships purposely abstain from laying down any rule as to the points which an appellant may competently raise under an appeal by leave from the Supreme Court of Canada. That must depend upon the special circumstances of each case. But it must be understood that parties who get such leave, upon the distinct representation that they desire to raise a particular question of law of great and general importance, cannot be permitted, at the hearing of the appeal, to change front and say that no such question arises, and to argue that the case turns upon a question of fact which the Supreme Court has wrongly assumed or decided. If the appellant Corporation, in petitioning for the exercise of Her Majesty's prerogative, had stated the same case which they attempted to present in argument, it is almost matter of certainty that leave to appeal would have been refused.

Upon the construction of the Municipal Acts, their Lordships entirely concur in the view taken by Chief Justice Ritchie. Section 323 of the General Act imposes upon the valuers appointed by the Council the duty of making a valuation of the "taxable property of the municipality;" and by the terms of Section 326 no part of a railway is made taxable property, except the land, as land, occupied by the road. In their Lordships' opinion the enactment of Section 327, to the effect that, when the Company make no return, the valuation of all their immovable property shall be made in the same manner as that of any other ratepayer, refers to their immovable property already declared to be taxable, and simply amounts to a direction that the value of such taxable estate shall be estimated by the town's valuers instead of the company itself.

The judgment of the Supreme Court ought, therefore, to be affirmed; and their Lordships will humbly advise Her Majesty to that effect. The appellants must pay the costs of this appeal.

ASSOCIATIONS**JURISDICTION OF COURTS OVER PRIVATE ASSOCIATIONS.**

BROWN V. LES CURÉS ET MARGUILLERS DE L'ŒUVRE ET FABRIQUE DE NOTRE DAME DE MONTRÉAL ¹

217. The civil courts of justice have jurisdiction over private voluntary religious or other lawful associations, to hear and determine complaints made by their members who may have been injured as to their rights, and to inquire into the law and rules of the tribunal or authority which has inflicted an alleged injury to one of his members.

SIR ROBERT PHILIMORE, p. 207:—It seems, however, to their Lordships to be unnecessary to pursue this question, because even if this

¹ Quebec, 1874 Nov. 21, L. R. VI P. C. 157.

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church were to be regarded merely as a private and voluntary religious society resting only upon a consensual basis, Courts of Justice are still bound, when due complaint is made, that a member of the society has been injured as to his rights, in any matter of a mixed spiritual and temporal character, to inquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury.

In the case of *Long v. Bishop of Cape Town*, their Lordships said: "The Church of England, in places where there is no church established by law, is in the same situation with any other religious body—in no better, but in no worse position; and the members may adopt, as the members of any other commission may adopt, rules for enforcing discipline within their body which will be binding on those who, expressly or by implication, have assented to them. It may be further laid down that where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not; and what shall be the consequence of such violation; the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice¹

ASSURANCE

See INSURANCE.

ASSIGNEE

See INSOLVENCY.

ATTACHMENT

See GARNISHEE, REGISTRATION: *effect of Writ of Fieri Facias.*

ATTORNEY**FINING, SUSPENDING, OR STRIKING ATTORNEYS OFF THE ROLL FOR CONTEMPT OR MISCONDUCT.****JUSTICES OF THE COURT OF COMMON PLEAS AT ANTIGUA²**

218. The colonial courts have the right to expel from the Bar those of its members who misconduct themselves.

LORD WYNFARD, p. 268:—In England the courts of Justices are relieved from the unpleasant duty of dis-barring advocates in consequence of the power of calling to the Bar and dis-barring having been in very remote times delegated to the Inns of Court. In the Colonies there are no Inns of Court, but it is essential for the due administration of justice that some persons should have authority to determine, who are fit persons to practise as advocates and attorneys

¹ Moore P. S. (N. S.) 461.

² Antigua, 1830 April 6, 1 Knapp 267.

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there. Now, advocates and attorneys have always been admitted in the Colonial Courts by the Judges, and the Judges only. The power of suspending from practice must, we think, be incidental to that of admitting to practice, as is the case in England with regard to attorneys. In Antigua the characters of advocates and attorneys are given to one person: the Court therefore that confers both character may for just cause take both away. Although indeed our own Courts do not dis-bar for the reason I have mentioned, I have no doubt they might prevent a barrister, who had acted dishonestly from practising before them. In a case which came before us a short time ago from Bombay, none of the members of this Board doubt that the Supreme Court there had authority to prevent English barristers to practise before them. The question was whether their authority had been properly exercised. Whilst advocates in the Colonies have an appeal to His Majesty, the power to remove them from practice can never be abused.

In re MONCKTON ¹

219. An attorney in Prince Edward Island having been arrested for debt claimed his privilege as practising attorney and was discharged, but at the same time by an *ex parte* judgment he was suspended by the chief justice. This judgment was set aside, as, if he was not entitled to his privilege as a *bona fide* practising attorney, he ought not to have been protected, if on the contrary, he had right to be set at liberty, he ought not to have been suspended.

EMERSON V. THE JUDGES OF NEWFOUNDLAND. ²

220. The Judicial Committee reversed the judgment of the court of Newfoundland, declaring absolute *ex parte nisi* for striking an attorney off the roll of that court for misconduct.

The rule was first granted by the court below striking the name of appellant from the Roll, unless cause to the contrary be shown in four days, and at the expiration of the four days, an application to extend the delay was prayed for, but was refused and the rule declared absolute. This application on the part of the appellant should have been granted as the appellant had established that it was necessary to enable him to prepare his defence.

BUNNY V. THE JUDGES OF NEW ZEALAND ³

221. The Supreme court at New Zealand suspended the appellant as a practising attorney, on the petition of another barrister, because the appellant had been sued in England.

¹ Prince Edward's Island, 1837 June 22, I Moore 455.

² Newfoundland, 1854 Feb. 16, VIII Moore 157.

³ New Zealand, 1862 Feb. 11, XV Moore 164.

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where he was formerly practising as solicitor, and was charged with fraud and misconduct in his professional character. The judge gave him a year to establish before the court that the charges against him were unfounded. The appellant not having made any proof of his innocence within the year, the court struck him off the roll.

The Judicial Committee held that the barrister, petitioner, had an interest to sustain his petition and confirmed the judgment.

In re WALLACE ¹

222. A judgment suspending an attorney of the Supreme court of *Nova Scotia*, from practising in that court, because, having been unsuccessful in a cause in which he was personally interested, he had written a letter to the Chief Justice, commenting on the judges and the administration of justice generally in the court, reversed by the Judicial Committee, as it substituted a penalty and mode of punishment which was not the appropriate and fitting punishment for the offence.

LORD WESTBURY, p. 156—This letter was a contempt of court, which it was hardly possible for the court to omit taking cognizance of.

It was an offence, however, committed by an individual in his capacity of a suitor in respect of his supposed rights as a suitor, and of an imaginary injury done to him as a suitor; and it had no connection whatever with his professional character, or anything done by him professionally, either as an advocate or an attorney. It was a contempt of Court committed by an individual in his personal character only.

To offences of that kind there has been attached by law and by long practice a definite kind of punishment, *viz.*, fine and imprisonment. It must not, however, be supposed that a Court of Justice has not the power to remove the officers of the Court, if unfit to be intrusted with a professional *status* and character. If an advocate, for example, were found guilty of crime, there is no doubt that the court would suspend him. If an attorney be found guilty of moral delinquency in his private character, there is no doubt that he may be struck off the Roll. But in this particular case there is no *delictum* brought forward or assigned, except that which results from the fact of addressing an improper and contemptuous letter to the Chief Justice of the Court, in respect of something supposed to have been done unjustly to the writer in his private capacity as a suitor. We think, therefore, there was no necessity for the judges to go further than to award to that offence the customary punishment for contempt of court. We do not find anything which renders it expedient for the public interest, or right for the Court to interfere with the *status* of the individual as a practitioner in that court. In

¹ *Nova Scotia*, 1866 Nov. 2, IV Moore N. S. 140.

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that respect, therefore, we think that the Judges departed from the course which ought to have been pursued, by adopting a different description of punishment from the ordinary punishment for offences of this nature.

When an offence was committed which might have been adequately corrected by that punishment, and the offence was not one which subjected the individual committing it to anything like general infamy, or an imputation of bad character, so as to render his remaining in the court as a practitioner improper, we think it was not competent to the court to inflict upon him a professional punishment for an act which was not done professionally, and which act, *per se*, did not render him improper to remain as a Practitioner of the Court.

In re POLLARD ¹

223. A Barrister practising before the Supreme court was, without any notice or rule to show cause, and without being heard in defence, by judgment of that court, fined and adjudged to have been guilty of several contempts of court in disrespectfully addressing the Chief Justice while conducting a cause. Such judgment was referred by the Crown to the Judicial Committee, under the statute, 3rd and 4th Will. IV, ch. 41, sect. 41 and was set aside, and the fine ordered to be remitted, first, on the ground that the order was bad, inasmuch as the offences charged were not of themselves such contempts of court as legally constituted an offence; and, secondly, that, even if they had been so, no distinct charge of the several alleged offences was stated, and no opportunity given to the party accused of being heard, before passing the sentence.

FROM THEIR LORDSHIPS' REPORT, p. 130:—Their Lordships do agree humbly to report to your Majesty that, in this judgment, no person should be punished for contempt of court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given to him.

In re STUART ²

224. By a judgment of the court below a practising attorney and proctor was struck off the Roll for having inserted in a deed of conveyance a false recital as to the consideration money, knowing the same to be false, and for attesting the execution of the deed, and signing his name as a witness to the receipt of the consideration money, knowing that no such consideration had passed, or was intended to pass. On

¹ Hong Kong, 1868 June 16, V Moore N. S. 111.

² Bengal, 1868 June 16, V Moore N. S. 187.

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appeal, this judgment was reversed, the Judicial Committee being of opinion, that although the preparation of such deed, and the knowledge of such facts, would be circumstances of great weight against an attorney cognizant of them in the event of such a deed, upon or soon after its execution, being used as an instrument of fraud, yet, as the circumstances of its preparation were capable of being explained, and no fraudulent use of the instrument had been made or attempted, no fraudulent notice alleged, and no injury directly or indirectly occasioned by it, the misstatement upon the face of such a deed could not be considered sufficient in itself to warrant the striking an attorney off the Roll of the court.

In re RAMSAY ¹

225. A judge of the court of Queen's Bench, in Lower Canada, whilst sitting alone in the exercise of the criminal jurisdiction, has, under the authority conferred on him by section 72 of ch. 77 of the Consolidated Statutes of Canada, no power to pronounce a counsel in contempt, for publishing two letters reflecting upon the conduct of such judge in his official capacity or to impose a fine; the matter being one cognizable by the full court only.

226. It was irregular on the part of this judge to issue himself the rule for contempt, without any evidence that the appellant had committed the contempt.

FROM THEIR LORDSHIPS' REPORT:—The Lords of the Committee, in obedience to your Majesty's said order of reference, have taken this petition into consideration, and, having heard counsel on behalf of Thomas Kennedy Ramsay (the Honorable Mr. Justice Drummond not having appeared or lodged a case) their Lordships do agree humbly to report to your Majesty that in their judgment the Honorable Mr. Justice Drummond whilst sitting alone in the exercise of the criminal jurisdiction conferred upon the Judges of the Court of Queen's Bench by the 77th of the Consolidated Statutes of Canada, had no authority to issue the Rule of the 23rd October, 1866, or to adjudge that Thomas Kennedy Ramsay had been guilty of a contempt of Court in publishing the two letters of the 27th day of August, and the 30th day of August, 1866, or to impose a fine of forty dollars upon the said Thomas Kennedy Ramsay: And that all proceedings against the said Thomas Kennedy Ramsay for the said alleged contempt in publishing letters reflecting on the conduct of the said Honorable Mr. Justice Drummond, whilst acting as a Judge of the Court of Queen's Bench, under Chapter 95 of the Consolidated Statutes of Canada, could only legally and properly

¹ Quebec, 1870 Nov. 26, VII Moore N. S. 263.

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be taken before the full Court of Queen's Bench: Their Lordships are also of opinion that the proceedings against the said Thomas Kennedy Ramsay were in other respects most irregularly conducted. The Rule of the 25th of September, 1866, was issued without any evidence that the said Thomas Kennedy Ramsay was the person who had written and published the letters, and the only evidence which was ever obtained of the said Thomas Kennedy Ramsay having written the letters, consisted of an admission, in writing, made by the said Thomas Kennedy Ramsay at the instance of the said Honorable Mr. Justice Drummond, for the purpose of settling the dispute between them, and which, if not accepted as a sufficient apology, ought to have been treated as written without prejudice. On the whole their Lordships humbly report to Your Majesty that although there are expressions in the letters of the said Thomas Kennedy Ramsay of which their Lordships cannot approve and of which the Honorable Mr. Justice Drummond had a right to complain, yet that, for the reasons above stated, in the opinion of their Lordships the fine of \$40 imposed upon the said Thomas Kennedy Ramsay ought to be remitted."

Her Majesty having taken the said report into consideration was pleased, by and with the advice of Her Privy Council, to approve thereof and to order, as it is hereby ordered, that the said fine of \$40 be remitted. Whereof the Governor-General, Lieutenant-Governor, or Commander-in-Chief of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

NEWTON V. THE JUDGES OF THE HIGH COURT, NORTH WESTERN PROVINCES.¹

227. An order of the High court suspending an advocate from practising for professional misconduct, reversed. Although the attorney had been guilty of serious misconceptions of law, error of judgment and grave irregularity, there was nothing amounting to *mala praxis* on which the court could fairly found any proceeding of a penal character.

228. Their Lordships regretted that the judges of the High court should have thought fit to frame themselves new charges against the accused advocate, and thus assume the functions of accuser and judge. A very strong and clear case may arise in which such a course would be justified. But the inconvenience of it is great, and the more manifest in the present cause, inasmuch as the learned judges found themselves obliged, in all but one instance, to abandon the charges which they themselves had on the first impression suggested and framed.

¹ North Western Provinces, 1871 Nov. 22, VIII Moore N. S. 202.

POWERS OF ATTORNEY AD LITEM.

THE SHIP "CLIFTON" ¹

229. What is stated by the advocate of a party in the presence of, and uncontradicted by, the agent of that party, must be considered as if it had been stated by the party himself and is binding on both.

KING V. PINSONEAULT ²

230. An attorney *ad litem* has the right to bind his client, until disavowed, by any proceeding in the cause, though taken without his client's authority, or even in defiance of his prohibition.

231. But "*transactions*" are not acts of procedure within the powers of attorneys, and are not binding upon the client unless specially authorized by him.

232. Accordingly, a defendant having signed a deed of transaction entered upon with the plaintiff's attorney, may revoke the agreement before the deed is ratified by the plaintiff himself. Nor can an attorney on his own authority settle a cause, abandon or compromise the rights of his client.

SIR ROBERT P. COLLIER, p. 259:—Their Lordships do not consider it necessary or desirable for the determination of the first of these questions, to inquire into the extent of the authority to settle causes of counsel, attorneys, or proctors in this country, founded, as it is, upon laws and customs in a great degree peculiar to ourselves. The law on this subject must be looked for in the Canadian Code, interpreted, if its provisions are obscure, by the aid of what light can be thrown upon them by the French law.

Mr. Justice Badgley, in his learned judgment, intimates an opinion, (as their Lordships understand him) that the "*transaction*" was invalid because it was not given effect to by a "*jugement d'expédient*," and in support of the view he quotes the following passage from *Pigeau*, Procédure Civile Vol. I, pp. 3, 359.

.....
The "*transaction*" by "*jugement d'expédient*," with its formalities, which was only one form of "*transaction*" according to the French law, has not been adopted or recognized in the Canadian Code, which does not require that a "*transaction*" shall be in any particular form, even if it consists in assenting to a judgment. The passage from *Pigeau*, however, is not unimportant as bearing on the general authority of *procureurs*, for if they have not authority to consent to a judgment, it may be argued that they cannot have the power to settle a cause, and to abandon or compromise the right of their clients without one. Mr. *Laflamme* was both "*avocat*" and "*avoué*." It does not appear, however, that the law gives any greater

¹ Admiralty, 1835 July 2, 11 Knapp 375.

² Quebec, 1875 March 2, L. R. VI P. C. 245.

POWERS OF ATTORNEY AD LITEM.

authority in his former than he had in his latter capacity. If he had any power analogous to that of a counsel in England, to settle a cause "in court," it is enough to say that it was not this power which he exercised; his power was merely that of an "*avoué*."

No French authority has been cited which goes the length of asserting that an "*avoué*" has a general power to bind his client by a "transaction" such as the present, and some French authorities have been cited which it is contended establish the negative of this proposition: *Dalloz, Répertoire de Jurisprudence*, v. *Transaction*, art. 4, s. 57; *Code Civil*, art. 1703; *Code Napoléon*, art. 1983.

It has been argued that if the inability declared by the French code to alienate and hypothecate without express powers carried with it the inability to "transact," the same words in the Canadian Code must have the same effect.

The plaintiff seeks to explain this passage as referring only to the powers of ordinary mandataries, and having no reference to "*avoués*" who are mandataries with extraordinary and exceptional powers. If, however, there is a class of mandataries so well known to possess this exceptional power, the omission of all notice of it in the place where notice of it would have been appropriate, or, indeed, in any part of the exhaustive treatise of *Dalloz* concerning "*Transactions*" is not a little remarkable.

The same doctrine is laid down in other books of authority. In *Guyot, Répertoire de Jurisprudence*, Vol. XVII, "*Transaction*" p. 235. The same doctrine is laid down by *Troplong, (droit civil expliqué*, s. 295) and by other writers on French law, without the supposed exception being ever noticed.

Undoubtedly, "*avoués*" possess some powers beyond those of ordinary mandataries of binding their principals unless their acts are expressly disavowed.

This subject is treated of at some length in *Dalloz, Répertoire de Jurisprudence*, "*Désaveu*" s. 3, art. 25, where many instances of such powers are given, not, however, including the power "to transact." It is also treated more succinctly in *Dalloz*. It is there said that in general every act of a mandatary is void which exceeds the bounds of his mandate, but that it is otherwise with mandataries *ad litem*, who are in some sense officers of justice representing citizens before the tribunals in the exercise of their profession. He thus sum up the law: "*En effet, jusqu'au désaveu tout acte du ministère de l'avoué, mandataire ad litem, quelles que soient les conséquences qu'il entraîne, est réputé fait en vertu du pouvoir de sa partie.*"

It appears to their Lordships that full effect may be given to the meaning of these expressions by treating the "*avoué*" as able to bind his client (until *désaveu*) by any proceeding in the cause, though taken without his client's authority, or even in defiance of his prohibition. The plaintiff is assumed to have authorized every claim made on his behalf in the declaration, the defendant every plea pleaded for him; for example, a plea of the *Statute of Limitations*, or a plea justifying a libel, though he may have prohibited their being pleaded. C. P. C. art 194.....

POWERS OF ATTORNEYS AD LITEM.

Their lordships are of opinion that to enter upon an agreement such as "the transaction" in question, which was in a great measure collateral to the cause, and was capable of being made the subject matter of a separate suit, cannot be properly termed an act of procedure in the cause.

Their Lordships have not discovered in the Canadian Codes any provision conferring upon "*avoués*" the power of entering into transactions if they did not before possess it. The subject of "mandate" is treated of under the 8th title, in five chapters articles 1703, 1704, 1232 C. C. P.

It does not appear to have been the intention of the framers of the Code to invest "*avocats*" or "*avoués*" with any new or exceptional powers, but rather to apply to them the general law with respect to mandataries as far as it was applicable.

In their Lordships' opinion, Mr. Laflamme had not authority, by reason of his being "*avocat*" and "*avoué*" to bind his client by this "transaction."

VALUE OF SERVICES.**THE QUEEN V. DOUTRE¹**

233. An advocate, in the Province of Quebec, retained to render professional services outside of his province, can recover as a *quantum meruit* according to services rendered; and may also lawfully contract for any rate of remuneration which is not *contra bonos mores*, or in violation of the rules of the Bar.

234. The law applicable is not the law of the province where the contract was made or where the services were rendered, but the law of the province where he is practising as an advocate, that of his own Bar.

LORD WATSON, p. 749:—On the 1st of October, 1875, the Government of Canada addressed and sent to the respondent, Mr. Joseph Doutre, a letter, signed by Mr. Bernard, the Deputy Minister of Justice, in the following terms:—

"Sir,—The Minister of Justice desires me to state that, the Government being desirous to retain counsel to act for them upon the proceedings in connection with the Fishery Commission to sit at Halifax, under the Treaty of Washington, he will be glad to avail himself of your services as one of such counsel, in conjunction with Messrs. Samuel R. Thompson, Q.C., of St. John, New Brunswick, and Robert L. Weatherbee, barrister, of Halifax. The Minister will be glad to know whether you are willing to act in that capacity, and in that case to place you in communication with the Department of Marine and Fisheries upon the subject."

Upon receipt of this letter the respondent wrote in reply that he would act as requested. The respondent is a member of the Montreal section of a body of legal practitioners incorporated by cap. 72

¹ S. C. Canada, 1884 July 12, L. R. IX Appeal Cases 745.

VALUE OF SERVICES.

of the Consolidated Statutes of Lower Canada, under the title of "the Bar of Lower Canada." By the terms of the statute each member of the Bar is admitted to practise as "advocate, barrister, attorney, solicitor, and proctor at law," and no person except a member of the Bar duly admitted is entitled to conduct business in any of these capacities before the courts of Lower Canada. Every member of the Bar must be registered in the district where he intends to practise, and he becomes answerable for his conduct to the council of that district, being liable, in case of his offending against professional rule or etiquette, to censure or to suspension from office for any period not exceeding a twelve month. It is not matter of dispute that, according to the law of Quebec, a member of the Bar is entitled, in the absence of special stipulation, to sue for and recover a *quantum meruit* in respect of professional services rendered by him, and that he may lawfully contract for any rate of remuneration which is not *contra bonos mores*, or in violation of the rules of the Bar. But it is asserted for the appellant that by the law of Ontario, the Province in which Ottawa, the seat of Government, is situated, a counsel cannot sue for his fees, and that he is under the same disability according to the law of Nova Scotia, where, according to Article 23 of the treaty, the Commission was to meet. In support of that contention, counsel for the appellant referred to the opinion of Chief Justice Harrison in *McDougall v. Campbell* (41 U. C. Q. B., 332) as correctly expressing the law of Ontario, but they mainly relied upon the proposition that in those provinces of the Dominion where the common law of England prevails, members of the Canadian Bar can neither have action for their fees nor make a valid agreement as to their remuneration, unless that right has been conferred upon them by statute.

In these circumstances it was maintained that the right of the respondent to sue for his fees must depend either upon the law of Ottawa, the *locus contractus*, or upon the law of Nova Scotia, the *locus solutionis*, and that in neither case was any suit competent to him. Were it necessary to decide all the points thus taken by the appellant, questions of much nicety would arise. It is by no means clear either that Ottawa was the *locus contractus*, or that Nova Scotia was, in the strict sense, the *locus solutionis*. It is at least a plausible view of the case that the contract was completed in Quebec at the moment of time when the respondent posted his letter accepting the employment offered him by the Minister of Justice. On the other hand, although the Commission was to sit at Halifax, it is perfectly plain that the work expected of the respondent and actually performed by him was by no means confined to advocacy of the Dominion claims during the sitting of the Commission. His employment was not limited to what would in this country be considered the proper duties of a counsel, but embraced the work of an agent or solicitor. In point of fact, he was employed to prepare the case of the Dominion Government as well as to plead in their behalf. That such was the understanding of both parties may be inferred from the known professional *status* of the respondent, as well as from the fact that, in pursuance of the so called retainer of the 1st of October,

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1875, the respondent had papers sent him, and was engaged at at Quebec during eighteen months, with occasional visits to Ottawa, in collecting and putting in shape materials for framing and supporting the claim which was to be urged before the commission. Then, as regards the other questions of law raised by the appellant, there is much difficulty. Their Lordships are willing to assume that the law of England, so far as it concerns the right of the bar of England to sue or make agreement for payment of their fees, was rightly applied in the case of *Kennedy v. Brown* (13 C.B.N.S., 677), but they are not prepared to accept all the reasons which were assigned for that decision in the judgment of Chief Justice Erle. It appears to them that the decision may be supported by usage and the peculiar constitution of the English Bar, without attempting to rest it upon general considerations of public policy. Even if these considerations were admitted, their Lordships entertain serious doubts whether, in an English colony where the common law of England is in force, they could have any application to the case of a lawyer who is not a mere advocate or pleader, and who combines in his own person the various functions which are exercised by legal practitioners of every class in England, all of whom, the bar alone excepted, can recover their fees by an action at law. But it is unnecessary, in the view which their Lordships take of this case, to decide any of these questions which were raised by the argument for the appellant. The right of the respondent to sue for remuneration does not appear to them to depend either upon the law of the place where the employment was given, or upon the law of the locality within which it was performed. When any advocate or other skilled practitioner is by law and the custom of his profession entitled to claim and recover payment for his professional work, those who engage his services must, in the absence of any stipulation to the contrary, expressed or implied, be held to have employed him upon the usual terms according to which services are rendered. That is the implied condition of every contract of employment which is silent as to remuneration, and it is dependent upon the *status* and rights of the person employed, and not upon the law of the place where his services are to be given, so long as he is employed in his professional capacity. A member of the Bar in England, in accordance with the law of that country and the rules of the profession to which he belongs, renders, and professes to render, services of a purely honorary character. If in his professional capacity as an English barrister he accepted a retainer to appear and plead before commissioners or arbitrators in a foreign country, by whose law counsel practising in the regular courts were permitted to have suits for their fees, that would not give him a right of action for his *honorarium*. His client would have a conclusive defence to such an action on the ground that he was employed as a member of the English Bar, and, by necessary implication, upon the same terms as to remuneration upon which members of that bar are understood to practice. The respondent is a member of the Quebec section of the bar of Lower Canada, and it was in that capacity that he was retained by the government as one of their counsel before the Fisheries

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Commission. The respondent has the rank of Queen's Counsel conferred upon him by Patent, but that circumstance does not appear to their Lordships to affect the present case. It gave him a certain precedence in a question with other members of the Bar, but it made no change upon the duties and obligations incumbent on him as a practising member of the Bar, or upon his privileges as such, including the right to sue for his fees. The retaining letter of the 1st of October, 1875, makes no mention of fees and their Lordships are accordingly of opinion that it must be held to have been an implied condition of the employment thereby offered that the respondent was to be remunerated for his services upon the same terms on which these services were rendered to clients in Quebec. The respondent was engaged and undertook to go to Halifax as a Quebec counsel, subject to the same rule of his Bar by which his conduct as a lawyer was regulated in Quebec, and it would be a strange result if, retaining his *status* and performing his work as a member of the Quebec Bar, he was nevertheless to be stripped of the privileges attaching to that *status* as soon as he entered the Province of Nova Scotia.

Their Lordships do not consider it necessary to notice the great variety of reasons assigned by the learned judges of the Supreme Court in support of the views which were severally adopted by them, with the exception of one point raised in the judgment of Mr. Justice Gwynne. That point is deserving of notice for this reason—that if the opinion of the learned judge, which is based on the provisions of the Petition of Right Act of Canada, be well founded, the respondent, though he might have suit for recovery of his fees from any subject, could not recover them, by petition, from the Crown. By a pardonable error, Mr. Justice Gwynne refers to the Act of 1875, instead of the Petition of Right Canada Act, 1876 (39 Viet., c. 27), which repealed the statute of the previous year. Section 19, which is identical, in expression, with the similar circumstances of the repealed act, provides “that nothing contained in this act shall give to the subject any remedy against the crown in any case in which he would not have been entitled to such remedy in England, under similar circumstances, by the laws in force there prior to the passing of the imperial statute 23 and 24 Viet., c. 34.” The learned judge seems to hold that these provisions place a Quebec lawyer on perfectly the same footing as an English barrister, so far as regards his right to proceed against the Crown for recovery of his fees. But it appears to their Lordships that the process of reasoning by which the learned judge arrives at that conclusion confounds two things which are essentially different—“right” and “remedy.” The statute does not say that a Quebec lawyer shall, in all cases, have only the same right against the Crown as a member of the English bar. What it does enact is that no subject in Canada shall be entitled to the “remedy” provided, unless he has a legal claim, such as could have been enforced by petition of right in England prior to the Imperial Act of the 23rd and 24th Victoria. It is impossible to hold that a member of the Quebec Bar who, by law and practice, is permitted to sue for his fees, when he seeks his remedy against the Crown, under the Canadian Act of 1876, has no such legal claim,

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and that he sues under circumstances similar to those in which an English barrister is placed who, neither by the usage of his profession nor the law of his domicile, can maintain any action for his fees.

NUMBER OF COUNSEL TO BE HEARD. *See PRACTICE : iisdem verbis.*

SOLICITORS BEFORE THE PRIVY COUNCIL. *See PRACTICE : iisdem verbis.*

AUCTION.

See SALE, GAMING AND WAGERING.

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BAILMENT

See BANK AND BANKING, DEPOSIT, SALE: what constitutes a

BANK AND BANKING

ADVANCES ON MERCHANDISE

AYERS V. THE SOUTH AUSTRALIAN BANKING COMPANY¹

1. A banking company incorporated by charter, which contained a clause declaring that it should not be lawful for the company to advance money on the security of merchandise, may maintain an action for money advanced on the faith of receiving as security a preferential lien on the wool of a certain quantity of sheep on board a ship, but which was not in the actual possession of the party receiving the advances, though a part owner of the sheep and the agent of the other owners for whose benefit the advances had been made. The banking company were entitled to recover for the value of the wool on such preferential lien.

LORD MELLISH, p. 446: — Another objection was taken by Mr. Mainstay on the terms of the charter, the clause in the charter which says, it shall not be lawful for the bank to make advances on merchandise. Now, unquestionably, a great many questions might be raised on the effect of that clause in the charter which may be of very great importance, but which also being of great difficulty, their Lordships do not think it necessary to give any opinion upon. There may be a question as to what are the transactions which come really within the clause, and whether this particular case does come within it. There may be also a question whether under any circumstances, the effect of violating such a provision is more than this, that the crown may take advantage of it as a forfeiture of the charter, but the only point it appears to their Lordships is necessary to be determined in the present case is this, that whatever effect such a clause may have, it does not prevent property passing, either in goods or in lands, under a conveyance or instrument which, under the ordinary circumstances of law, would pass it.

BANKERS' LIEN.

LONDON CHARTERED BANK OF AUSTRALIA V. WHITE²

2. Bankers have under common law a general lien on all securities deposited with them as bankers by a customer,

¹ South Australia, 1871 Feb. 2, VII Moore 432,

² Victoria, 1879 May 23, L. R. IV Appeal Cases 413.

BANKERS' LIEN.

unless there be an express contract or circumstances that show an implied contract inconsistent with the lien.

Brandao v. Barnett & al. 3 C. B. 531; 12 Cl. & F. 787.

BRANCHES.

PRINCE V. ORIENTAL BANK CORPORATION ¹

3. The branches of a bank are not separate and distinct banks, but branches of one and the same banking corporation, that is, agencies of one principal establishment. There may be, however, circumstances in regard to which they are considered as separate establishments; as: 1° for the purpose of estimating the time at which notice of dishonour should be given: *Clode v. Bayley* 12 M. W. 51; 2° to pay cheques which generally are payable where the customer keeps his accounts. *Woodland v. Fear* 7 E. & B. 519.

BANK OF AFRICA V. THE COLONIAL GOVERNMENT ²

4. In principle a bank and its branches are one bank, and when a bank-note is received at a branch office, the effect is the same as if it were received at the head office.

DUTY OF A BANK ADVANCING MONEY.

COMMERCIAL BANK OF CANADA V. GREAT WESTERN RAILWAY
COMPANY OF CANADA ³

5. Where a statute legalised a loan already made of £250,000 by the respondent to another company, and also authorised the same company to use its funds by loans or otherwise to facilitate access to other railways, provided no such expenditure should be incurred unless sanctioned by a vote of two-thirds of the shareholders, a bank, in advancing money to the directors of the company respondent, was bound to ascertain for itself, at its own risk, whether the loan was authorised by the shareholders, and had no right to assume that the directors must have authority to borrow.

INTEREST PAYABLE BY BANKERS.

LONDON CHARTERED BANK OF AUSTRALIA V. WHITE ⁴

6. Bankers improperly or without title retaining money overpaid to them as mortgagees or bailees are chargeable with interest thereon.

¹ New South Wales, 1878 Jan. 24, L. R. III Appeal Cases 325.

² Cape of Good Hope, 1838 Feb. 7, L. R. XIII Appeal Cases 215.

³ Upper Canada, 1865 July 27, XIII Law Times N. S. 105.

⁴ Victoria, 1879 May 27, L. R. IV Appeal Cases 413.

POWERS OF DIRECTORS.THE BANK OF AUSTRALASIA V. BREILLAT.¹

7. Amongst the general powers which the directors of a bank possess for its good administration, are those of borrowing money for banking purposes and of binding the bank by signing bills or notes for money so borrowed, unless such power is excluded by the terms of their appointment.

THE RIGHT HON. P. PEMBERTON LEIGH, p. 194:—Then, is the nature of a banker's business such as to exclude the power, from want of occasion for its exercise? Quite the contrary. The nature of a banker's business, especially if the bank be one both of issue and deposit, necessarily exposes him to sudden and immediate demands, which may be to the extent of a large proportion of his debts, while his profits are to be made in employing his own moneys and those entrusted to him in discounting bills, in loans, and other modes of investment. It is impossible that he should always have his assets in such a state as to be applicable immediately to the payment of all demands which may be made upon him; and if a partner has no power under such circumstances, to borrow money for the partnership, either the assent of each individual member must be obtained, which may often be impracticable, or the concern must be ruined.

We have no doubt at all, therefore that, in ordinary banking partnership, such power exists, and that the directors, by the terms of their appointment, had all the general powers, and among the rest, the power of borrowing, unless such power is excluded by other provisions of the Deed.

POWERS OF MANAGERS.BANK OF NEW SOUTH WALES V. OWNSTON.²

8. The arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and therefore not within the ordinary powers of a bank manager's authority. It is, therefore, necessary in order to hold a bank liable for illegal arrest to establish by evidence that such arrest or prosecution was within the scope of the duties and class of acts the manager of the bank was authorized to perform. That authority may be general, or it may be special and derived from the exigency of the particular occasion on which it is exercised. In the former case it is enough to show commonly that the agent was acting in what he did on behalf of the principal; but in the latter case evidence must be given of a state of facts which shows that such exigency was actually present, or from which it might reasonably be supposed to be actually present.

¹ New South Wales, 1847 Dec. 14, VI Moore 152.

² New South Wales, 1879 March 28, L. R. IV Appeal Cases 270.

POWERS OF MANAGERS.

SIR MONTAGUE E. SMITH, p. 289 : — The duties of a bank manager would usually be to conduct banking business on behalf of his employers, and when he is found so acting, what is done by him in the way of ordinary banking and transactions may be presumed, until the contrary is shewn, to be within the scope of his authority; and his employers would be liable for his mistakes, and, under some circumstances, for his frauds, in the management of such business : *Mackay v. Commercial Bank of New Brunswick*, 5 Law Rep. P. C. 394. But the arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and when the question of a manager's authority in such a case arises, it is essential to inquire carefully into his position and duties. These may, and in practice do, vary considerably. In a case of a chief or general manager, invested with general supervision and power to control, such an authority in certain cases affecting the property of the bank might be presumed from his position to belong to him, at least in the absence of the directors. The same presumption might arise in the instance of a manager conducting the business of a branch bank at a distance from the head office and the board of directors...

P. 290 : — An authority to be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a limited one, and before it can arise a state of facts must exist which shows that such exigency is present, or from which it might reasonably be supposed to be present. If a general authority is proved, it is enough to show, commonly, that the agent was acting in what he did on behalf of his principal. But in the case of such a limited authority, as that referred to, the question whether the emergency existed, or might reasonably have been supposed to exist, arises for decision; and that question raises issues beyond the mere facts that the agent acted on behalf of and in the supposed interest of the principal; were it otherwise, the special authority would be equivalent to a general one.

Their Lordships referred to different cases relating to the liability of railway companies for wrongful arrests by their servants, to wit :

Eastern Counties Railway Co. & al. v. Brown, 6 Ex. 314; *Roe v. Birkenhead, etc., Railway Co.*, 7 Ex. 36; *Gof v. Great Northern Railway Co.*, 3 E. & F. 672; *Edwards v. London & North Western Railway Co.*, 5 L. R. C. P. 445; *Moore v. Metropolitan Railway Co.*, 8 L. R. Q. B. 36; *Poulton v. London & South Western Railway Co.*, 2 L. R. Q. B. 535; *Allen & South Western Railway Co.*, 6 L. R. Q. B. 65.

See also PRINCIPAL AND AGENT : *powers of agents*.

POWER OF LIQUIDATORS OF BANKS. See ACQUIESCENCE : *power to acquiesce*.

RESPONSIBILITY OF BANKS AS BAILEES.

GIBLIN V. McMULLIN¹

9. The action was in damages against a bank, for the loss through its negligence of certain railway debentures placed in their care by a customer, in the ordinary way of their business. The debentures had been stolen by the cashier who made away with them.

It was held by the Privy Council that the bank, as gratuitous bailees, were not bound to exercise more than ordinary care of the deposits entrusted to them, and the negligence for which alone they would be made liable would have been the want of that ordinary diligence which a reasonably prudent man takes of his own property of the like description.

LORD CHELMSFORD, p. 460:—From the time of *Lord Holt's* celebrated judgment in *Coggs v. Bernard*², in which he classified and distinguished the different degrees of negligence for which the different kinds of bailees are answerable, the negligence which must be established against a gratuitous bailee has been called "gross negligence." This term had been used from that period, without objection as a short and convenient mode of describing the degree of responsibility which attaches upon a bailee of this class. At last, *Lord Cramworth* (then *Baron Rolfe*), in the case of *Wilson vs Brett*³, objected to it, saying that he "could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet." And this critical observation has been since approved of by other eminent judges.

Of course, if intended as a definition, the expression "gross negligence" wholly fails of its object. But as there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the term may be usefully retained as descriptive of that difference, more especially as it has been so long in familiar use and has been sanctioned by such high authority as *Lord Holt* and *Sir William Jones* in his "Essay on the Law of Bailment." In the case of *Grill v. The General Iron Screw Collier Company*⁴, Mr. *Justice Willes* after agreeing with the dictum of *Lord Cramworth*, and stating that the same view of the term "gross negligence" was held by the *Exchequer Chamber* in *Real v. The South Devon Railway Company*⁵, said, "Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use." It is hardly correct to say, that the *Court of Exchequer Chamber* in the case referred to adopted the view of *Lord Cramworth* as to the impropriety of the term "gross negligence," Mr.

¹ Victoria, 1868 Dec. 3. V Moore N. S. 434.

² *Ld. Ragus*, 909.

³ M. & W. 113.

⁴ Law Rep. 1 C. P. 612.

⁵ H & C. 337.

RESPONSIBILITY OF BANKS AS BAILEES.

Justice Crompton, in delivering the opinion of the court, said: "It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the Lord Chief Baron in the court below, where he says, 'There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them,' and he added 'for all practical purposes, this rule may be stated to be, that the failure to exercise reasonable care, skill, and diligence is 'gross negligence.'" Mr. Justice *Montague Smith*, in the case in which the above-mentioned observations of Mr. Justice *Willer* were made, said: "The use of the term 'gross negligence' is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence." The epithet "gross," is certainly not without its significance. The negligence for which, according to *Lord Holt*, a gratuitous bailee incurs liability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment, but from some culpable default. No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a bailee must exercise corresponds with the degree of negligence for which he is responsible, and there would be the same difficulty in defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility.

In truth, this difficulty is inherent in the nature of the subject, and though degrees of care are not definable, they are with some approach to certainty distinguishable; and in every case of this description in which the evidence is left to the jury, they must be led by a cautious and discriminating direction of the judge to distinguish, as well as they can, degrees of things which run more or less into each other.

RESPONSIBILITY OF A BANK FOR ILLEGAL ARREST. See BANK AND BANKING: *powers of manager.*

RESPONSIBILITY OF A BANK MANAGER.

THE BANK OF UPPER CANADA V. BRADSHAW¹

10. The appellants were suing their late manager to recover money lost on bills of exchange and promissory notes which were discounted by him, while managing the bank, in favoring certain companies and firms in which he was interested. The evidence established that such transactions were all in the ordinary course of the business of the bank; that he had not exceeded the power and authority with which he was entrusted; and that he had not acted in bad faith in any case brought up in the trial.

¹ Lower Canada, 1867 June 26, 1V Moore N. S. 406.

RESPONSABILITY OF A BANK MANAGER.

The Judicial Committee, affirming the judgments of both courts below, held, under the circumstances, that no such action could be sustained, and that the bank should bear the losses. The appeal was dismissed with costs.

RETURNS.**BANK OF AFRICA V. THE COLONIAL GOVERNMENT ¹**

11. A bank note in circulation ordinarily means a note which is passing from hand to hand as a negotiable instrument representing a certain value. When it is returned to the bank from which it was issued it ceases to circulate as there is no longer any person entitled to require payment from the bank which can cancel it or re-issue it.

12. The word "outstanding" is still more significant than "in circulation," and points to an engagement or liability of the bank.

13. According to these principles, where a law obliges the banks to make a monthly return of bank-notes "in circulation" as "outstanding," they are not obliged to include the bank-notes in their possession or in the possession of their branches.

SECURITY FOR OVERDRAWN ACCOUNTS.**THE NATIONAL BANK OF AUSTRALIA V. CHERRY ²**

14. Where a bank had the power by statute to take and hold for reimbursement only, not for profit, freehold and leasehold lands, houses, etc., in satisfaction of any debt due to the bank or security for any liability previously incurred, but not in anticipation of such, and to sell and dispose of the same: provided that it should not be lawful for the bank to advance or lend money upon the security of lands, houses, etc., a security so obtained for money overdrawn on current account is not for future advances and is legal, and the bank has the right to have the said security sold.

15. In case of insolvency of the debtor in such circumstances, the bank is entitled to a rule against the assignee ordering him to sell the property and to pay the proceeds to the bank.

See also STATUTE : *construction.*

¹ Cape of Good Hope, 1888 Feb. 7, L. R. XIII Appeal Cases 215.

² South Australia, 1870 June 30, VII Moore N. S. 91.

TRANSFER OF SHARES.

BANK OF MONTREAL V. SWEENEY¹

16. The respondent was proprietor of shares in a commercial corporation which shares were into the possession of a trustee. This latter transferred the shares in payment of his own private debts to the appellant bank which had notice of these facts and knew that the respondent held them in trust only. The Judicial Committee held that by such knowledge the duty was cast upon the bank to refuse to take the property until they had ascertained that the trustee was authorized to transfer the shares; and having neglected to do so, the bank was now obliged to account for the same to the owner.

LORD HALSBURY, p. 81: — Their Lordships consider it to be proved in this case that Rose held the disputed shares upon a trust not disclosed by the entry in the Company's books; that he transferred them to the Bank in breach of his trust; that at the time of the transfer the Bank knew of Rose's position; and that the plaintiff turns out to be the person in whose favor the trust existed.

It was argued for the appellants that these things are not proved, because they require a written *commencement de preuve*, and have not got it. But on this point their Lordships stopped the respondent's counsel. They are quite clear that if a written *commencement* is needed, it is to be found in the letters of Crawford and Lockhart coupled with the books of the Rolling Mills Company, and in the transfer executed by Rose to Buchanan on the 3rd June 1876.

Under these circumstances the question arises whether the Bank must not be in the same position as if they had known that the plaintiff was interested in the shares, and that the transfer by Rose was in violation of his duty to the plaintiff. Their Lordships do not impute moral blame to Mr. Buchanan or to any agent of the Bank, for those gentlemen may be guilty of nothing more than a mistake of law. Nor do they think it necessary to examine how far the relations between Rose and the plaintiff may have resembled or differed from those of an English trustee and his beneficiary, or to go into the English doctrines of constructive fraud, or constructive notice. The Bank had express notice that as regards the property transferred to them Rose stood to some person in the relation expressed by the words "in trust," and the only question is what duty was cast upon the Bank by that knowledge. Their Lordships think it wrong to say that any less duty was cast upon them than the duty of declining to take the property until they had ascertained that Rose's transfer was authorised by the nature of his trust. In fact they made no inquiry at all about the matter following, as Mr. Buchanan says, the usual practice. So acting, they took the chance of finding that there was nobody with a prior title to demand a transfer from Rose, and as the plaintiff is such a person they cannot retain the shares against her claim.

¹ Quebec, 1887 June 25, 56 L. J. P. C. 79.

TRANSFER OF SHARES.

Their Lordships are led to this conclusion by the ordinary rules of justice as between man and man, and the ordinary expectations of mankind in transacting their affairs. If indeed they found any principle of Quebec law which absolutely forbade that property should be placed in the name of a person, with a simultaneous notice providing his power over it should not be absolute but restricted, that would control their decision. That view has been pressed upon them from the bar with great ability and force, but, as they hold, without authority to support it. The authorities cited relate to *mandataires prête-noms* and are to effect that, when once property has been placed under the dominion of such an agent, third parties may safely deal with him alone, even though notice is given to them that his principal is not assenting to his acts. Their Lordships think it unnecessary to examine this statement of the powers of a *mandataire prête-nom*, for they find no definition or description of such an agent which does not require that he should have a *titre apparent*, which they understand to mean that he must be ostensible owner, made to appear to the world as absolute owner. They asked whether there was any text or case to show that an agent can be a *mandataire prête-nom* when the instrument conferring the property on him carried upon its face a declaration that his property is qualified. No such authority could be found. In this case Rose was never for an instant held out to the world as absolute owner, and therefore he never could have given a good title to a third party by his own sole authority.

Then it was argued that the words "in trust" do not show a title in any other person, and that they might be merely a mode of distinguishing one account from another in the Company's books. Their Lordships think that they do import an interest in some other person, though not in any specified person. But whatever they mean, they clearly show the infirmity or insufficiency of Rose's title; and those who choose to rely on such a title cannot complain when the true owner comes forward to claim his own.

It is worthy of remark that, in their plea, the appellants claim to be the true owners of the shares upon the very same principle upon which the plaintiff's claim is founded. Rose did not transfer them to the Bank by name, but to Buchanan "in trust." The appellants aver that this transfer was made as security for a debt due from Rose to them, and that the shares "are now legally held for the said Bank."

If that is the essential truth of the transaction as between Buchanan and the Bank, why should it be otherwise as between Rose and the plaintiff?

The result is that their Lordships agree in all material points with the Supreme court of Canada. They will humbly advise Her Majesty to affirm the decree of that court, and dismiss the appeal. The appellants must pay the costs.

ACCEPTANCE OF**BANKRUPTCY***See* INSOLVENCY.**BAR***See* ATTORNEY.**BASTARD***See* LEGACY, MARRIAGE, WILL.**BEACHES***See* RIPARIAN PROPRIETORS, RIVER.**BENEVOLENT SOCIETY***See* ASSOCIATIONS, LEGISLATURE : *legislative powers : iisdem verbis.***BETS***See* GAMING AND WAGERING.**BIDS***See* SALE, GAMING AND WAGERING.**BILLS OF EXCHANGE****ACCEPTANCE OF**RAMCHURN MULLICK V. LUCHMEECHUND RADAKISSEN.¹

17. A foreign bill of exchange, payable after sight, must be presented for acceptance; and although there is no limited time defined by statute for presentment, and no usage of trade to fix the time, yet such bill must be presented within a reasonable time.

18. What constitute a reasonable time is a mixed question of law and fact for the determination of the court and the jury.

19. In this case a bill of exchange was drawn at Calcutta on the 16th of February 1848, payable sixty days after sight, the bearer kept the bill for five months and nine days, and then sold it to a third party who did not present it for acceptance until the 24th of October in that year. The drawee then refused to accept it. It was held that the presentation of the bill for acceptance was not made within a reasonable time, and that the drawer was discharged, and that it was not an excuse for the non presentation of the bill that the drawers continued solvent from the date of the bill to the presentation, or that no actual damage was caused to them by the delay.

MR. BARON PARKE, p. 65: — There is a little doubt, that it was much too late to contend, that the law does not require a presentment or acceptance of a foreign or other bill of exchange, payable

¹ Calcutta, 1854 Feb. 15, IX Moore 46.

ACCEPTANCE OF

at, or a certain time after sight. How otherwise can the time the Bill has to run be fixed, where it is payable after sight? Indeed, the statute of 3rd & 4th Anne, ch. 9, sec. 7, makes an inland bill of exchange, received in satisfaction of a debt, a full and complete payment if the holder does not take his due course to obtain payment thereof, by endeavouring to get the same accepted and paid, and, therefore, in some cases, undoubtedly, it requires the presentment for acceptance; and as the law has been long settled that the holder of a bill, payable after date, is not obliged to present it for acceptance, it must apply to bills payable on or after sight. Presentment, then, being necessary for acceptance, the inconvenience of an indefinite postponement of the time of payment of such a bill, which the unlimited power of presenting when the holder might please would necessarily lead to, long ago suggested that there should be a limit. In some foreign nations it is provided for by positive enactment, fixing the times of presentment with reference to the places where the bill is drawn, and where the drawee resides, as in the French "*Code de Commerce*," Lib. I. part. 8, sec. II. But in our law, there being no such fixed limit by enactment, where there is no usage of trade to fix the time, it has long been established, that such bill must be presented in a reasonable time, which is a mixed question of law and fact, for the determination of a jury, with the assistance of a judge, when trial by jury exists, and for the determination of the Court, where they exercise, as they do in *Calcutta*, the functions of a jury as well as those of judges. This rule is adopted for want of a better law defining the time precisely.

GODFRAY V. COULMAN ¹

20. A bill of exchange drawn in *Jersey*, and payable by the drawers' correspondents in *London* three days after sight, or order, and not presented until thirty-seven days after date, was presented within a reasonable time, being a foreign bill of exchange.

THE RIGHT HON. DR. LUSHINGTON p. 20:—Without entering into the consideration of the pleas, it is admitted, as a general principle deduced from the authorities referred to in the argument, that a foreign Bill of Exchange ought to be presented within a reasonable time, and what is a reasonable time is to be regulated according to the circumstances of each individual case. The circumstances which constitute a reasonable time must always be local circumstances, such as the place where the bill is drawn, the time of putting it in circulation, as well as the other facts of the case, which must all be brought to notice.

THE CHARTERED MERCANTILE BANK OF INDIA LONDON
AND CHINA V. DICKSON. ²

21. The law with regard to time for the presentation of a promissory note payable on demand, requires that the

¹ Island of Jersey, 1859 Feb. 9, XIII Moore II.

² Island of Ceylon, 1871 Jan. 28, VIII Moore N. S. I.

ACCEPTANCE OF

presentation for payment be made within a reasonable time, that is, a period reasonable with reference to the circumstances connected with each particular case.

22. In this cause, a promissory note dated the 16th February 1864, and endorsed, was made payable on demand, but the payment was not contemplated by the makers at any immediate or specific date. The presentation was made the 14th December in the same year. The Privy Council held that it appeared from the evidence, that the note was meant to be, to a greater or less extent, a continuing security, and that the delay in presentation was, under the circumstances of the case, not unreasonable, and the holders of the note were entitled to recover thereon.

CANCELLATION OF SIGNATURE.

PRINCE V. ORIENTAL BANK CORPORATION ¹

23. The mere fact of cancelling the signature of the makers, and writing "paid" on the note, corrected subsequently by this memorandum on the note: "cancelled in error by J. O. Atchinson" is not a presumption of payment and cannot be effectual to charge the holder with a receipt of the money. *Warwick v. Rogers*, 5 M. & G. 340.

COLLATERAL SECURITY.

THE ORIENTAL BANK CORPORATION V. LEMBKE ²

24. A bill of exchange was drawn by the vendor of goods shipped, upon the consignee and buyer, which bill was afterwards discounted by the appellant, the vendor depositing at the same time with the bank, as collateral security, the bill of lading of the goods shipped. The bank had the bill of exchange accepted by the buyer and at the same time delivered to them the bill of lading. The buyer failed before the bill became due and it was dishonoured.

25. The Judicial Committee notwithstanding that the bank had parted with the bill of lading, held the respondent, the said vendor, liable for the payment of the bill of exchange, on the ground that according to the understanding between them, the bank had the option to retain the collateral security or to part with it.

DISCHARGE OF INDORSERS OR ACCEPTORS.

TORRANCE V. BANK OF BRITISH NORTH AMERICA ³

26. An acceptor or indorser of a bill of exchange is not discharged from liability because an agreement is entered

¹ New South Wales, 1878 Jan. 24, L. R. III Appeal Cases 325.

² Hong Kong, 1879 July 22, XLI Law Times. N. S. 385.

³ Quebec, 1873 March II, L. R. V. P. C. 246.

DISCHARGE OF INDORSERS OR ACCEPTORS.

into between the maker and the holder to postpone the payment of the bill or note, without altering or affecting in any manner the position of the surety, and to this latter's knowledge, especially when by his deeds the acceptor or indorser made it appear that he agreed to the delay.

27. After the maturity of a bill of exchange discounted by a bank, the maker and the bank agreed, on the faith that the indorser would not object, to renew it, and a cheque was drawn by the maker, accepted by the bank, and sent to the indorser with a letter, in which it was stated: "I have drawn on you to day at three months for \$10,000, and enclose cheque on B. N. A. for same amount to retire "bill due on 18th instant." The acceptor presented the cheque and received the money, and afterwards refused to accept the new bill of exchange. It appeared in evidence that the acceptor knew the agreement between the bank and the maker.

28. Under those circumstances, it was held that the cashing of the cheque was an acceptance of the contract to renew the bill and the acceptor was bound.

LORD JUSTICE MELLISH, p. 250:—Then, that being so, it appears to their Lordships most clearly that Messrs. Torrance were bound either to refuse or to accept the offer that was made to them. There was an offer made to them on behalf of both parties, on behalf of the Bank of British North America and on behalf of Yarwood, that they would assent to renew the bill of exchange, and the cheque was given to them for the purpose of enabling them to carry out the renewal, if they assented to it. Therefore, it appears that they were entitled to do one of two things, either to accept the offer that was made to them, and then they were bound to accept the bill of exchange, or else they were entitled to reject the offer that was made to them, and then if they did that they were bound to return the cheque. But, without giving any notice to the bank that they accepted or refused the offer made to them, they took upon themselves to present the cheque and get it cashed. Now, it appears to their Lordships quite clearly that they were not entitled to take advantage of the agreement which had been made between Yarwood and the Bank of British North America, to which their assent was requested, by cashing the cheque, unless they meant to bind themselves to act upon the agreement by accepting the bill of exchange. That being so, the consequence is that having acted upon it, and then afterwards having refused to accept the bill of exchange, they were bound to return the money which they had obtained on what the bank must have understood to be a representation that they were going to accept the offer that was made to them, and going to accept the bill of exchange.

It does not appear to their Lordships that it is really necessary to say precisely what, if these facts had arisen in England, and it

DISCHARGE OF INDORSERS OR ACCEPTORS.

had become necessary to bring an action or to file a bill in England, would have been the precise remedy which would have been open to a person in England, whether it would have been an action for not accepting the bill of exchange, or an action for money had and received, or whether it would have been a bill in equity to recover back the moneys as having been obtained in bad faith, though if it were necessary to give an opinion upon that point, probably an action for money had and received would be the real remedy which would be open in the Courts here; that, however, is a technical question. The substantial and real question is that it was a matter of bad faith. I do not mean to make any remark against Messrs. Torrance's character at all, but, still, under the circumstances, it was a matter of bad faith, that when they got the cheque with full notice that the cheque was only given to them on the assumption that they would come into the arrangement of renewing the bill of exchange, it was a matter, as it appears to their Lordships, of bad faith for them to go and cash the cheque, being determined at the very same time, and having already made up their minds, that they would refuse to accept the bill of exchange.

Then, it was contended by Mr. Benjamin, in his very able argument, that Messrs. Torrance's position was altered by the arrangement, and that he, being a surety, was thereby discharged. Their Lordships are not able to see in what respect his position was altered. Certainly no time was given, because the first bill of exchange was not due until the 18th of July, and before the first bill was due the second bill must either have been accepted or rejected; and Yarwood was not discharged from any obligation which he had, because his only obligation was to provide the funds on the 18th July. The argument seems to be that having made this arrangement with the bank, he, as a matter of fact, would not make any other efforts to obtain the funds. He was not discharged from obtaining them. His liabilities remained exactly what they were before, and if the bill had not been renewed, that is to say, if Messrs. Torrance did not accept the bill of exchange, no time would have been given, because he would have been instantly liable on both bills. Therefore their Lordships do not see that there is any ground for saying that Messrs. Torrance were discharged, because their position as surety was altered or affected by what was done. It is very difficult to say how a surety's position can be altered, because the two parties say, "We offer to you to postpone your payment for three months if you like to accept it, you may either accept or reject it; but we offer to you, if you please, to postpone your liability to pay us for three months." It appears to their Lordships that that did no harm to the surety and could not have the effect of discharging him.

Some authorities were cited; there was the case of the *Bank of Ireland v. Archer*, the facts of which do, to a certain extent, resemble the facts in the present case; but, really, the only question that was decided in that case, the only question which was reserved by the Judge at the trial was, whether a promise to accept a foreign bill of exchange before the bill of exchange was drawn amounted to

DISCHARGE OF INDORSERS OR ACCEPTORS.

an acceptance. No question whatever was raised respecting any right to recover under money had and received, or in any other way. The other case which was cited, *Key v. Cotesworth*, appears to their Lordships to have no bearing on the present case.

On the whole, their Lordships are of opinion that they must humbly advise Her Majesty that the Judgment of the Court of Queen's Bench for the Province of Quebec should be affirmed, and that this Appeal should be dismissed, with costs.

DRAWN ON AGENT.

HOOD V. STALLYBRASS & AL.¹

29. In this case the principal drew a bill of exchange on his agent as follows: "Four months after date pay to my order 'the sum of £500 value received in coals and advance per 'Eskdale.' The principal having failed, the liquidators shut the establishment of the agent, and the bill was dishonoured. The respondent, indorser upon the bill, recovered judgment against the acceptor and seized the coals in his possession. The Judicial Committee held that the possession of the coals received by the Eskdale S. S. was not a proof that the acceptor was the proprietor of it, and that in the presence of positive evidence that he was only the agent of the maker, the coals could not be seized by the respondent to satisfy the judgment.

NATURE OF

BELLINGHAM V. FREER²

30. A bill of exchange operates, by the law of France, as a real contract between the drawer and the drawee, and this contract is of the nature of *mandate mandatum solvendæ pecuniæ* which takes place, and is contracted, by the acceptance of the bill by the drawee.

Polhier, Contrat de Change, part. 1, chap. 4, art. 3, No 91, 92, 97.

WILLIAMS V. AYERS³

31. Although bills of exchange, drawn and accepted by the same parties, may be in strictness promissory notes rather than bills, yet where the intention to give and receive such documents as instruments capable of being negotiated in the market as bills of exchange is clear, both the holders and the parties may treat them accordingly.

SIR JAMES W. COLVILLE, p. 142: — There is no doubt some authority for the proposition that such instruments are in strictness rather promissory notes than bills. But the passage cited from

¹ C. C. Constantinople, 1878 June 27, XXXVIII Law Times. N. S. 827.

² Lower Canada, 1837 May 16, 1 Moore 333.

³ Australia, 1877 Dec. 10, L. R. III Appeal Cases 133.

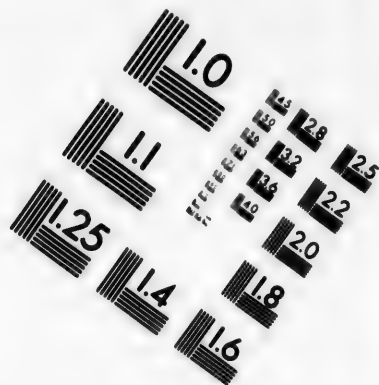
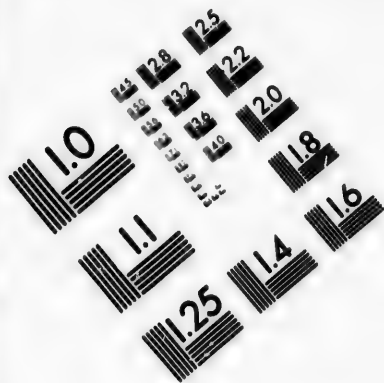
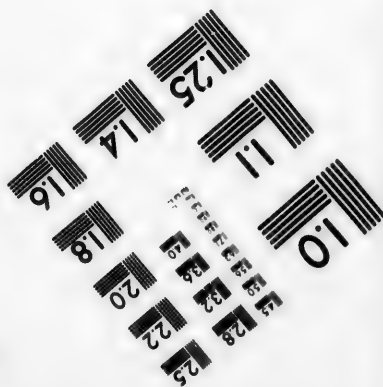
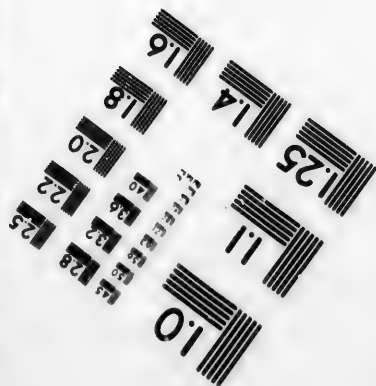
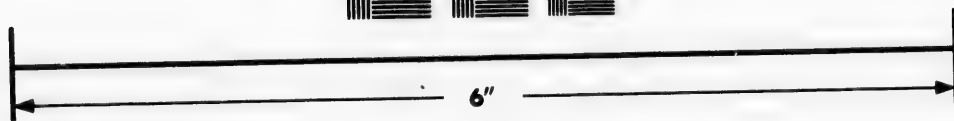
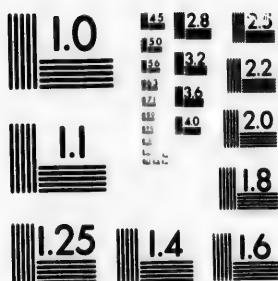


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NATURE OF

Pardessus, Cours de Droit Commercial, tom. III, art. 335, shows that the French law makes a distinction when the document purports to be a bill drawn by a house of business in one country upon a house of business in another country, and would treat it as a bill of exchange, notwithstanding the identity of the persons carrying on business in the two establishments, and in this country there are authorities to show that although the holder of such an instrument may at his election treat it as a bill of exchange or as a promissory note, the drawer might be estopped from alleging that it was not a bill of exchange upon the principle applied to foreign scrip in *Goodwin's v. Roberts*.¹ Nor does it seem to be essential that the holder should be a subsequent indorsee for value. The same rule may well apply to the original parties, if it be clear on the evidence, as it is here, that it was the intention of the one to give, and the other to receive, a document capable of being negotiated as a bill of exchange in the market.

NOTICE OF DISHONOR.**BLACK V. THE OTTOMAN BANK**²

32. The principle of the contract entered into between the parties to a bill of exchange is that the endorsees shall have a notice of the dishonor of the bill, and that the default by the holder to give such notice is equivalent to a discharge.

THE RIGHT HON. LORD KINGSDOWN, p. 484:—The cases referred to upon Bills of exchange turn upon a different principle, viz., that, by mercantile usage, a contract is implied by the holder to give notice of dishonor, within a certain time, to the drawer or indorser who stands in the situation of surety for the acceptor.

PAYMENT WITH**MAXWELL V. DEARE**³

33. An agreement by which a bill of exchange is substituted for cash payment is only to be considered as payment by the bill being honored at maturity, even when the acceptor, according to the agreement between the parties, has given in his books credit to the payee and has debited the drawer.

PROPERTY IN**NUTTYLOLL SEAL V. DENT**⁴

34. When bills of exchange are deposited with an agent for sale with special directions how to apply the proceeds of the sale thereof, the property in the bills, and in the pro-

1 L. Rep. 1 Appeal Cases 476.

2 Constantinople, 1862 July 3, XV Moore 472.

3 Cape of Good Hope, 1853 June 15, VIII Moore 354.

4 Calcutta, 1853 May 10, VIII Moore 319.

PROPERTY IN

ceeds of the bills, remains in the original bearer until the purpose for which they were remitted is satisfied. And if the agent applies otherwise the money realised by the sale without any new instructions and upon his own authority, the sale is null as made without authority by the agent and the owner of the bills may recover the value of the bills in *assumpsit*, upon an *indebitatus* count, from the purchaser of them, who had notice of the purpose for which they were remitted to the agent and the misapplication of the proceeds by him.

RE-EXCHANGE.

WILLIAMS V. AYERS¹

35. A custom as to allowing a fixed percentage by way of liquidated damages in lieu of exchange, re-exchange, and other charges, when bills are returned from the colonies dishonoured, however valid in law, does not apply in the absence of an agreement express or implied to allow re-exchange.

SIR JAMES W. COLVILLE p. 145 :—Looking, however, to the fact that in other countries and notably in America, the practice of allowing a fixed sum by way of liquidated damages, in lieu of re-exchange calculated in the ordinary way, has been recognized by the courts, even where it depended on usage, and had not been sanctioned, as in some of the *United States* it has been, by statute; looking also to the fact that in *Auriol v. Thomas* 2 T. R. 52, Mr. Justice Buller appears to have recognized such a custom in the case of East India bills as unobjectionable; their Lordships are not prepared to pronounce the alleged custom invalid in law on the face of it.....

P. 146.—If an ordinary bill of exchange is drawn in one country upon persons in another and distant country, the holder who has contracted for the transfer of funds from the one country to the other almost necessarily sustains damage by the dishonour of the bill. He must take other means to put himself in funds in the country where the bill was payable. Hence the right to "re-exchange" which is the measure of those damages.

RIGHT OF HOLDER.

CHAPMAN V. THE BRITISH GULANA BANK²

36. A joint action on behalf of the holder of a promissory note lies against the maker, together with the indorser provided due notice of the dishonor is given to the indorser.

¹ Australia, 1887 Dec. 10, L. R. III Appeal Cases 133.

² British Guiana, 1846 Dec. 16, VI Moore 23.

RIGHTS AND OBLIGATIONS OF ENDORSERS.

MURROW V. STUART ¹

37. If the endorser means to make a restrictive endorsement, he must state so in plain and intelligible language. A bill of exchange payable six months after sight was indorsed by a first indorsee with the following words: "value in account with the Oriental Bank." The bill having been dishonored, a subsequent indorsee brought an action against the first indorsee. Demurrer was fyled alleging that the first indorsement was restrictive.

The Supreme court of *Hong Kong* held that there was nothing upon the indorsement to prevent an assignment of the bill, so as to give the subsequent indorsee a right of action.

This decision was affirmed by the Judicial Committee, the words, "value in account with the Oriental Bank" not constituting such a restrictive indorsement as precluded the plaintiff from suing upon this bill.

CASTRIGUE V. BUTTIGIEG ²

38. The respondent acted as agent in *Malta* for the appellant, for the purpose of buying and remitting to the appellant, in *England*, bills of exchange, on account of money received by the respondent in *Malta*. In the course of his agency the respondent purchased bills in *Malta* and indorsed them to the appellant, without any reservation in the indorsement as to his liability.

The Judicial Committee held that in the absence of special circumstances, showing that any liability was intended, by the general mercantile law, which must be taken to be in force in *Malta*, the respondent was not liable to the appellant, upon the bills being dishonored.

The doctrine of the liability of an agent indorsing a bill of exchange for his principal examined and explained as follows:

THE RIGHT HON. SIR WILLIAM H. MAULE, p. 107: —The question, then, that remains to be considered is, whether the respondent is liable to the appellant as indorser. In determining this question, it does not appear to be necessary to consider any peculiarity, if there be any on this subject, of the law of *Malta*. The case was argued, and appears to depend on the general merchant law prevailing in all civilised countries; if there be in *Malta* any special form of writing which forms a necessary ingredient in an indorsement, the

¹ *Hong Kong*, 1853 Feb. 3, VIII Moore 267.

² *Malta*, 1855 Nov. 27, X Moore 94.

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writing in the present case must be taken to be in that form, or, in other words, the indorsement was regular; the whole argument proceeding on that ground, and nothing appearing to the contrary, as to the question of the substantial liability of the respondent, the foreign code establishing the liability of an indorser as a general proprietor as well as the English text writers to the same effect, are merely declaratory of the general mercantile law on the subject, and it is on this same law that the judicial decisions, both English and foreign, which were cited on both sides, proceeded. It is therefore to be considered whether, according to such general law, the facts appearing in the present case are sufficient to show that the respondent is liable as indorser, to the appellant his immediate indorsee of the bills in question.

The liability of an indorser to his immediate indorsee arises out of a contract between them, and this contract in no case consists exclusively in the writing popularly called an indorsement, and which is indeed necessary to the existence of the contract in question, but that contract arises out of the written indorsement itself, the delivery of the bill to the indorsee, and the intention with which that delivery was made and accepted, as evinced by the words, either spoken or written, of the parties, and the circumstances, (such as the usage at the place, the course of dealing between the parties and their relative situations) under which the delivery takes place, thus a bill, with an unqualified written indorsement, may be delivered and received for the purpose of enabling the indorsee to receive the money for account of the indorser, or to enable the indorsee to raise money for his own use on the credit of the signature of the indorser, or with an express stipulation that the indorsee, though for value, is to claim against the drawer and acceptor only, and not against the indorser, who agrees to sell his claim against the prior parties, but stipulates not to warrant their solvency. In all these cases the indorser is not liable to the indorsee, and they are all in conformity with the general law of contracts, which enables parties to them to limit and modify their liabilities as they think fit, provided they do not infringe any prohibitory law

P. III:—With regard to indorsing the bills with the words "without recourse," by so doing the indorser would indeed have avoided all liability to any subsequent holder, as well as to his immediate indorsee, but such a course would have cast suspicion on the bills; would have rendered them less negotiable, and would probably have been very distasteful to the principal. It is to be observed that the bills, being payable at ninety days after date, would arrive in *England* many weeks before their maturity, and it would, therefore, be important to the appellant that they should be so drawn and indorsed as to be readily negotiable. In putting his name on the bill as indorser, and thereby becoming answerable to holders subsequent to the appellant, the respondent adopted a mode of remitting bills which was reasonable and convenient for the purposes of the appellant, his principal, to whom, he was bound by his duty as agent to remit in some reasonable and convenient mode,

RIGHTS AND OBLIGATIONS OF ENDORSERS.

though he was not bound by such duty to incur any liability upon the bill. If it be said that the respondent having clearly rendered himself liable as indorser to any subsequent holder of the bills, and not expressly restricted his liability to his immediate indorsee, ought to be considered as answerable to him; the answer is that this is the usual case with an accommodation bill, the accommodating party relying on the indemnity of the party accommodated, and in the present case, though the agent might, if he would, indorse the bills he remitted, yet not being bound to do so he would not adopt this course, but would prefer some of the others above indicated, if his opinion of the solvency of his principal, or the state of accounts between them, rendered such caution necessary. If, therefore, the question on this appeal were to be determined upon principle, independent of authority, this Committee would be of opinion that the respondent ought to be considered as an agent, who, in the due execution of his duty to his principal, bought the bills for him, and caused them to be made payable to himself, and indorsed them for the purpose only of performing his duty in a manner beneficial and convenient to the principal, and that the principal had notice of these circumstances at the time of the delivery. This state of things, it appears to the Committee, would, in the absence of any other circumstances, such as express words or local usage, or a course of dealing between the parties, and in the absence of any authority to the contrary, show that no liability of the respondent as indorser to the appellant as indorsee arose out of the transaction in question.

MACDONALD V. WHEELFIELD¹

39. Where the directors of a company mutually agreed with each other to become sureties to a bank for the same debts of the company, and in pursuance of that agreement successively indorsed three promissory notes of the company, they are not liable to indemnify each other successively according to the priority of their indorsements, but are liable to equal contribution *inter se*.

LORD WATSON, p. 744:—In the present case the appellant, although his endorsement was first written, was a stranger to the notes in the same sense as the respondent, and it is not matter of dispute that the endorsements of both were given for one and the same purpose, viz., in order to induce the bank to discount two of the notes, and pay the proceeds to the promisor, the St. John's Stone China Ware Company, and also to give the Company credit in account current to the amount of the third note. It was argued, however, for the respondent, that, in the absence of some special contract or agreement between them, the notes themselves, strangers giving their endorsements successively must be held to have undertaken the same liabilities *inter se* which are incumbent on successive holders and endorsers of a note for value. The appel-

¹ Quebec, 1883 July II, L. R. VIII Appeal Cases 733.

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lancaster and respondent must therefore, it was said, be assumed to stand towards each other in the relation of prior and subsequent endorsers for value, inasmuch as it had not been proved, *habili modo*, that they had specially agreed that their endorsements were to have the effect of making them co-sureties, seeing that their endorsements were made, without reference to the order of their signatures, in pursuance of a mutual agreement to give their joint guarantee to the bank that the notes would be duly retired by the Company.

Their Lordships see no reason to doubt that the liabilities *inter se* of the successive indorsers of a bill or promissory note must, in the absence of all evidence to the contrary, be determined according to the ordinary principles of the law-merchant. He who is proved or admitted to have made a prior indorsement must, according to these principles, indemnify subsequent indorsers. But it is a well established rule of law that the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relations to each other of the parties who put their signatures upon it, either as makers or as indorsers; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law-merchant would otherwise assign to them. It is in accordance with that rule that the drawer of a bill is made liable in relief to the acceptor, when the facts and circumstances connected with the making and issue of the bill sustain the inference that it was accepted solely for the accommodation of the drawer. Even where the liability of the party, according to the law-merchant, is not altered or affected by reference to such facts and circumstances, he may still obtain relief by shewing that the party from whom he claims indemnity agreed to give it to him; but in that case he sets up an independent and collateral guarantee, which he can only prove by means of a writing which will satisfy the statute of Frauds.

But the respondent insists, and the Court below seems to have held, that, in determining the rights and liabilities *inter se* of these endorsers for the accommodation of the Company, regard must be had, not to the contract in pursuance of which they became endorsers, but to the order of their endorsements, as evincing the terms of their contract. That doctrine appears to their Lordships to be at variance with the principles of the English law. In a case like the present, the signing of their names on the note, by way of endorsement, in order to induce the bank to discount it to the promissor, is not as between the endorsers, *pars contractus*, but is merely the performance by them of an antecedent agreement. The terms of that previous contract must settle their liabilities *inter se*, irrespective altogether of the rules of the law-merchant, which will nevertheless be binding upon them in any question with parties to the note who were not likewise parties to the agreement. The law upon this point was correctly laid down by the Court of Common Pleas in *Reynolds v. Wheeler*, 10 C. B. (N.) 561. In that case, one Cheeseman drew a bill, and asked Reynolds to accept it for his accommodation, which Reynolds did. The bank refused to discount,

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whereupon Wheeler, at the request of Cheeseman, endorsed, and the bill was then discounted, Cheeseman receiving the proceeds. The bill was renewed at maturity, Reynolds, on this occasion, being drawer and Cheeseman acceptor, whilst Wheeler endorsed it as he had done before. Reynolds paid the renewal bill, and claimed contribution from Wheeler as a surety with him for the same debt. Wheeler resisted the claim on the same plea which is put forward by the respondent in the present case, viz., that, in the circumstances, he had only agreed to undertake the liability evidenced by the endorsement, and consequently he was not liable in relief or contribution to one who, like Reynolds, had previously become party to the bill as drawer or acceptor. But the Court overruled the plea. Erle, C. J., said, "The substance of the transaction is this:—Cheeseman was in want of money, and applied to Reynolds and to Wheeler to lend him their names in order to obtain it. If the money had been raised by the joint and several note or bond of the three, it could not have for a moment been contended that Reynolds, paying the whole, would not have been entitled to contribution. The machinery adopted here was the drawing of a note by Cheeseman upon Reynolds, and the endorsement of it by Wheeler." And Williams, J., stating the law to the same effect, said, "If the relation of surety subsists he (Reynolds) is entitled to contribution, and we are entitled to disregard the form of the instrument."

In the present case the directors of the St. John's Stone China Ware Company one and all agreed with each to become sureties to the bank for the same debts of the Company. That was the substance of the agreement to which they came on the 5th August, 1875, and the fact that the machinery which they adopted for carrying out their agreement was the making of three promissory notes by the Company, payable to the appellant, and successively endorsed by him and his co-directors, cannot have, in law, the effect of altering the mutual relations established by that agreement, and of substituting for these the liabilities of proper endorsers of an ordinary commercial note.

It was argued, however, that the respondent gave his endorsements at the request of the appellant, and must, therefore, be held to have given them on the faith of his having recourse against the appellant as a prior endorser. That contention was rested upon certain statements made by the respondent in his deposition as a witness for the appellant. He stated, "I was asked to endorse the notes in question by Edward Macdonald, in fact urged to do so, to sign them, that it was all right, which I did." Again, in answer to the question "by his own counsel, at whose instance did you endorse the notes in question?" he says, at the instance of Edward Macdonald." The argument is really without foundation in fact. There is not a word in those statements to suggest that the appellant, Edward Macdonald, did anything more than urge the respondent to carry out the agreement which had already been come to by all the directors present in order to aid the finances of the Company.

The authority of Reynolds v. Wheeler, and similar cases, is in no

RIGHTS AND OBLIGATIONS OF ENDORSERS.

wise affected by the decision of the House of Lords in the Scotch case of *Steele v. Mackinley*, which is referred to in the judgment of the Court below. In that case A, acting on behalf of his sons B and C, arranged with D that the latter should make an advance to them of 1,000*l.* upon their personal security. D accordingly drew a bill for that amount on B and C, and delivered it to A, in order that he might procure their acceptance. A did obtain their acceptances, and before returning the accepted bill to D, he wrote his own name upon the back of it. The acceptors failed to retire the bill, and D, the drawer, brought an action against the representative of A (who had died in the meantime) for recovery of its contents, upon the allegation that A had signed as a co-acceptor, or at all events with the intention and effect of becoming a surety to him for the acceptors. Parole evidence was made, not only in regard to the making and issue of the bill, but also in regard to statements made at various times by the deceased, tending to prove a separate and independent engagement by him to guarantee payment of the bill by his sons. The admissibility of the evidence, so far as it bore upon the facts and circumstances connected with the making and endorsement of the bill, was not questioned either at the bar or by the House. On the contrary, the House did take that evidence into account, although it was ultimately held that the claim preferred by D was neither supported by the principles of the law-merchant, nor by any inference derivable from these facts and circumstances. But the House rejected the parole evidence adduced by D in order to establish an independent contract of guarantee, upon the ground that such a contract could only be proved by a writing properly signed under the 6th section of the "Mercantile Law Amendment (Scotland) Act, 1856," which extends to Scotland the provisions of the English Statute of Frauds with respect to mercantile guarantees.

The respondent's counsel, in the course of the argument, referred to the case of "*Jansen v. Paxton*" (28 C. P., U. C., 439), decided by the Court of Error and Appeal in Upper Canada, and to three other decisions of the Canadian Courts. With the same view, they cited the case of "*Macdonald v. Magruder*," decided in 1830 by the Court of New York, United States (3 Peters, 470, and 8 Curtis, 491). These authorities were relied upon as establishing the doctrine that, where several persons mutually agree to give their endorsements on a bill, as securities for the holder who wishes to discount it, they must be held to have undertaken liability to each other, not as sureties for the same debt, and so jointly liable in contribution, but as proper endorsers, liable to indemnify each other successively, according to the priority of their endorsements, unless it had been specially stipulated that they were to be liable as co-sureties. It is unnecessary to enter into a minute criticism of these cases. Some of them are, in their circumstances, distinguishable from the present case; but there are undoubtedly to be found in the opinions of the learned Judges by whom they were decided *dicta* which seem to recognize the doctrine contended for by the respondent. If they are to be regarded as authorities to that effect, their Lordships cannot accept these cases as conclusive of the law of England, or as

RIGHTS AND OBLIGATIONS OF ENDORSERS.

precedents which ought to govern the decision of this appeal. The Civil Code of Lower Canada (Article 2340) enacts that "in all matters relating to bills of exchange not provided for in the Code, recourse must be had to the laws of England in force on the 30th day of May, 1849." By article 2346 of the Code, the same law is made applicable to promissory notes as to bills of exchange, in so far as regards the liability of the parties; and seeing that the Code makes no provision regarding the question raised between the appellant and respondent, that question must, in the opinion of their Lordships, be decided according to the law of England, as laid down by the Court of Common Pleas in "*Reynolds v. Wheeler*."

Their Lordships will, accordingly, advise Her Majesty that the judgment appealed from ought to be reversed; and that the action *en garantie* at the respondent's instance ought to be dismissed, with the declaration that the appellant and the respondent made their several endorsements upon the promissory notes in question, along with other directors of the St. John's Stone China Ware Company, as co-securities for the said Company, and are, in that capacity, entitled and liable to equal contribution *inter se*.

SUSPICIOUS.

McCARTHY v. JUDAH¹

40. An action was brought against a testamentary executrix upon the following document alleged to be a promissory note: — "On demand, I will pay at any time to Miss M. J., if she will marry my adopted son, A. P. H., £1,500 currency. Three Rivers, 14th August 1840, Mr. H." The defence to the action was that this instrument was a forgery. Upon the evidence it appeared that to make his claim, the plaintiff had waited until the death of Mr. H., and neither the principal nor the interest was claimed during the lifetime of Mr. H. although the condition was accomplished, nor was it shown how the instrument came into the plaintiff's possession, nor did the plaintiff in any way account for not enforcing the demand during the lifetime of Mr. H.

It was further proved that Mr. H. during his life provided for his son and his wife and family by a donation *inter vivos* sufficient to enable them to live according to their condition.

The Privy Council, without deciding that the instrument was a forgery, found that from the facts they were led to the conclusion that Mr. H. had provided for the plaintiff by deed of donation in satisfaction of the promise made to her, which inference coupled with the fact of the plaintiff not claiming, or bringing the action in Mr. H.'s lifetime, or accounting for the custody of the instrument, afforded strong

¹ Lower Canada, 1858 June 21, XII Moore 47.

SUSPICIOUS.

proof of satisfaction by the deed of donation for any promise made by Mr. H.

Under all these suspicious circumstances, it was incumbent on the plaintiff to prove how this note came into her possession, although, in ordinary cases, the possession of the document, assuming it to be genuine, might be sufficient proof that it was given to her by the person who made the promise, and that it came by lawful means into her hands.

WHEN NEGOTIABLE.**BOARDMAN V. QUAYLE ¹**

41. A promissory note made in the following terms: "We promise to pay to the bearer on demand, one pound 'British in Bank notes or bills on London' is a negotiable instrument according to the law of the Island of Man and to the commercial practice there, whatever may be the law of England or the general law of merchants.

RICHER V. VOYER. ²

42. A bank certificate in the following form: "*A. a déposé dans cette banque à intérêt à 4 o/o par an, la somme de \$2,000, payable à l'ordre de B., lors de la remise du présent certificat. Cette somme pour porter intérêt devra rester au moins trois mois dans cette banque, et le porteur de ce certificat ne pourra la retirer qu'après quinze jours d'avis, l'intérêt cessant du jour de cet avis*" is a promissory note and a negotiable instrument.

SIR MONTAGUE E. SMITH, p. 475: — On the first point, his case is, that the certificate is a negotiable instrument, capable of being the subject of "don manuel," and that his possession of it, endorsed by Madame Voyer, satisfies the requirement of the law as to delivery.

Much discussion took place at the Bar on the true nature of this document. On the one side, it was said that it had all the attributes of a promissory note; on the other, that it was an acknowledgement only of the deposit, and that the indorsement was no more than authority to the holder to receive the money, which, unless coupled with an interest, would be revocable. It appears that certificates of this kind are in common use among bankers in Canada and the United States, and considerable discussion has taken place in those countries as to their legal character. The American and Canadian law does not apparently differ from that of England with respect to the essential qualities of a promissory note. Article 2,344 of the Canada Code thus defines it: —

"A promissory note is a written promise for the payment of

¹ Isle of Man, 1857 June 18, XI Moore 223.

² Quebec, 1874 May 2, L. R. V. P. C. 461.

WHEN NEGOTIABLE.

money at all events, and without any condition. It must contain the signature or name of the maker, and be for the payment of a specific sum of money only. It may be in any form of words consistent with the foregoing rules."

The word "payable" in the certificate in question unquestionably imports a promise to pay the sum deposited, and interest at 4 per cent and "à l'ordre" are the apt words to constitute a negotiable instrument, transferable by indorsement (see art. 2286). So far the essential attributes of a negotiable promissory note are obtained; but it was said that the provisions that the money should not carry interest unless it remained at least three months in the bank, and that the holder of the certificate should not withdraw the money until after fifteen days' notice, the interest ceasing from the day of the notice, imported conditions and contingencies incompatible with the certainty required in such an instrument. The answer given to this objection was, that the provision as to interest only prescribed the time when it was to commence and cease; and that the stipulation for fifteen days' notice introduced no more uncertainty into the promise than occurs in a bill payable so many days after sight.

With regard to authority, the respondent's counsel relied on a decision in Pennsylvania, in which the court held that certificates of this nature are not negotiable (*Patterson v. Poindexter*, 6 Watts and Sargent, 227). On the other hand, the appellant's counsel referred to an American text writer of high authority. Mr. Parsons, who in his "Treatise on Promissory Notes and Bills of Exchange," after stating that certificates of this nature were in common use, and had given occasion to much discussion, and after referring to numerous cases containing conflicting decisions, and among them *Patterson v. Poindexter*, says: — "We think this instrument (of which he gives the form) possesses all the qualities of a negotiable promissory note and that seems to be the prevailing opinion." (vol. I, p. 26). It is to be observed, however, that the form given by Mr. Parsons omits the provisions as to interest and notice which appear in the present certificate.

From the evidence given by bankers and others who were called in this case to prove a custom, it certainly appears that those certificates have been commonly treated as transferable by indorsement, but whether with recourse to the indorser does not appear.

If it were essential to the decision of this appeal to determine the vexed question of the nature of this certificate, it would, of course, be their Lordships' duty to do so, but in the view they take of the second branch of this case they are relieved from this necessity. It is enough, therefore, for them to say of a document not in use in England, and which has been the subject of conflicting decisions in America, that there is high authority in favour of the appellant's construction of it, and they will assume, in dealing with the rest of the case, that this contention on this point is well founded.

BILLS OF LADING

See AFFREIGHTMENT.

BLOCKADE

See INTERNATIONAL LAW: capture for breach of

BOTTOMRY AND RESPONDENTIA

DUTIES OF PERSONS ADVANCING MONEY ON

HEATHORN V. DARLING¹

43. Before taking a bottomry bond from a master of a ship requiring the necessary supplies to continue his voyage, it is the duty of the person advancing the supplies to use due diligence to ascertain if the master could not procure them without resorting to a bond, as they may be found, in some cases upon personal credit only. If this latter case is established in evidence, the bond may be set aside.

SOARES V. RAHN. THE "PRINCE OF SAXE COBOURG"²

44. The purchaser of a bottomry bond is bound to know that the master's authority to bind the ship and cargo by a bond is founded on necessity alone, and that it is his duty, before he takes a security so onerously affecting the property of others, to satisfy himself by a reasonable inquiry, that the circumstances of the case justify the master in issuing a bond. The fact that such a bond is sold at public auction is not sufficient to render all inquiry on the part of the purchaser unnecessary, as the principal object of public sale is only to obtain the lowest rate of interest.

LAW GOVERNING BOTTOMRY CONTRACT MADE IN A FOREIGN PORT.

See INTERNATIONAL LAW: iisdem verbis.

LIEN FOR RESPONDENTIA BOND. *See SALVAGE: lien on cargo for salvage service. Ex cargo "SALAUS."*

CONDITIONAL BOND.

STEPHENS V. BROMFIELD. THE "GREAT PACIFIC."³

45. A bottomry bond was given by the master of a ship to raise a loan of money for necessary repairs; the ship and freight being hypothecated under it. The bond contained a clause to the effect that the obligation should be void if the obligors should pay, in consequence of the loss of the ship, such an average as by custom would have become due on the

¹ Admiralty, 1836 July 2, 1 Moore 5.

² Admiralty, 1838 Dec. 18, III Moore 1.

³ Admiralty, 1889 June 15, VI Moore N. S. 151.

CONDITIONAL BOND.

salvage, or if the ship should be utterly lost, cast away, or destroyed, in consequence of the perils of the sea. The ship, on her homeward voyage, met with such bad weather as to be obliged to put into an intermediate port in a damaged state, and after being surveyed was found unseaworthy, and sold while existing in specie for a sum less than the amount of the bond.

The Judicial Committee held: *First*, that the doctrine of constructive total lost does not apply to bottomry bonds as in the case of insurance between insurers and insured, and the bondholder's claim to the entire proceeds of the same was upheld; *second*, that the above clause in the bond did not apply when the ship remained in specie, though so much damaged that it would have cost more to repair her than she was worth.

SIR JAMES W. COLVILLE, p. 159:—The general law is succinctly stated in Kent's Commentaries, vol. III § 359, p. 454 (11th Ed.) speaking of a loan on Bottomry, he says: "There is not, in respect to the contract, any constructive total loss. Nothing but an utter annihilation of the subject hypothecated will discharge the borrower on Bottomry. The property saved, whatever it may be in amount, continues subject to the hypothecation." In support of this he cites *Thomson v. The Royal Exchange Assurance Co.* 1 M. & S. 30, and the doctrine is supported by modern admiralty cases: The "*Catherine*" 15 Jur., 231; The "*Elephanta*" 15 Jur., 1185; The "*Dante*" 62 Wm. Rob., 4276; The "*Draco*" 2 Summer's Ann. Rep. 157.

SMITH V. THE BANK OF NEW SOUTH WALES.

THE "STAFFORDSHIRE" ¹

46. Where a bottomry bond was given by a master of a ship for necessary supplies and repairs of the ship, with the condition that if a bill of exchange drawn upon a person who already held a mortgage upon the ship, was duly honoured the bond would become void, and the mortgagor having died leaving no known representatives, his will not having been admitted to probate, it was held that the presentation of the bill for acceptance at the office of the mortgagor was a sufficient compliance with the agreement and that the bondholder had the right to proceed against the ship.

47. A bottomry bond may be made upon the ship, the cargo and the freight to be earned on the voyage which is to be accomplished before the bond becomes payable, but subsequent freight cannot be hypothecated, because by the very nature of a bottomry bond the person who takes it is

¹ Admiralty, 1872 Feb. 13, L. R. IV P. C. 194.

CONDITIONAL BOND.

to become liable for the maritime risk, and, therefore, nothing can be hypothecated, except something which is in danger of perishing by maritime risk during the time that the bond is running.

RIGHT OF MASTER TO EFFECT LOANS.SOARES V. RAHN.¹

48. A master can only effect a loan upon a bottomry bond when he cannot otherwise raise the necessary funds to enable him to refit the ship and to make the repairs required to continue his voyage.

THE RIGHT HON. DR. LUSHINGTON, p. 8:—in considering the law applicable to this state of facts, it may be expedient to advert to the principles on which the validity of bottomry bonds has always been made to rest in the court of admiralty. In the large majority of cases the master is neither owner nor part owner of the ship or cargo; when he takes up money on bottomry, he pledges the property of others, and that, too, upon maritime interest, which frequently is extremely high, and very onerous to the owners. To justify him in such an act, and to warrant the foreign merchant advancing his money on valid security, it is requisite, by the maritime law, that the advances shall be merely to enable the ship to refit, or to pay for the repairs and dispatch of the vessel, for the completion of her voyage, and that the master shall be unable to obtain the same on personal credit.

This rule has always been rigidly maintained, and with no other qualification than that which justice and the interests of commerce necessarily call for. If the foreign merchant, after due inquiry, shall have reasonable ground for concluding that the repairs are necessary, and that the money cannot be raised on personal credit; then his security on the ship and cargo shall not be impeached or invalidated, because it might happen, that notwithstanding his reasonable and *bona fide* inquiries, the repairs were not necessary or the money might have been had on personal credit.

GORE V. GARDINER.²

49. Threat of arrest alone is not a justification on the part of the master of a vessel to raise a loan on bottomry bond, when the vessel itself cannot be arrested.

MR. BARON PARKE, p. 82:—From the accounts it is clear that the supplies were furnished on the personal credit of the master. There is too great a proneness on the part of masters of vessels to resort to bottomry bonds; it is only for necessary supplies or repairs that resort to a bottomry bond can be upheld, but even then it must be such a necessity as requires the hypothecation, viz., no personal credit being to be obtained. Here the supplies, in the first place,

¹ Admiralty, 1838 Dec. 18, III Moore 1.

² Admiralty, 1840 Feb. 6, III Moore 79.

RIGHT OF MASTER TO EFFECT LOANS.

are not necessary supplies; there are several items in the accounts which are clearly not for necessary supplies or repairs. Then at the time the goods are supplied, no agreement is made that their amount shall be secured by hypothecation, that is essential; but the day after the accounts are delivered, the master, as he alleges, upon a threat of arrest and without any previous agreement or existing necessity executes a bottomry bond. Now, although he might have been arrested yet the ship could not have been detained; there is no pretence that there was any attempt or threat to arrest the vessel.

SMITH V. GOULD ET AL. THE "PRINCE GEORGE"

50. A bottomry bond given by the master of a ship for advances to obtain his discharge from arrest, at the instance of the consignees, on account of damage done on the voyage to part of the cargo, and also for payment of the port duties and other disbursements necessary to enable the ship to prosecute her voyage, was held good to the extent of the sums advanced for the necessary supplies and the payment of the port duties, but was rejected for the money given to discharge the master from arrest.

51. The judgment of the court below rejecting the bond *in toto* was reversed, as a bond may be good in part and void in another part.

WALLACE V. FIELDEN. THE "ORIENTAL"

52. The authority of the master of a ship to raise money on bond upon the ship or the cargo for the absolute necessities of the ship, only arises when he cannot obtain the necessary advances upon the personal credit of the owner; and such power to raise money by bottomry belongs to the master, although the owner resides in the same country, but provided that there is no means of communication with the owner, and that the delay might cause the loss of the ship.

WILKINSON V. WILSON. THE "BONAPARTE"

53. The master of a small Swedish vessel gave a bottomry bond upon the ship, freight and cargo. The ship was then in Sweden with cargo consigned in England. He gave communication of the bond to the owners of the vessel, but none to the consignees. The Privy Council held that, considering the distance between Sweden and England, and the means of communication, it was necessary for the validity of the bond, so far as the cargo was concerned, that the master should have communicated with the owners of

1 Admiralty, 1842 Feb. 19, IV Moore 21.

2 Admiralty, 1851 June 19, VII Moore 398.

3 Admiralty, 1853 June 29, VIII Moore 459.

RIGHT OF MASTER TO EFFECT LOANS.

the cargo before giving the bond hypothecating the cargo, as the answer of the consignee would have reached him within a time not inconvenient with reference to the circumstances of the case.

THE LORD KNIGHT BRUCE, p. 474:—That it is an universal rule that the master, if in a state of distress or pressure, before hypothecating the cargo, must communicate, or even endeavour to communicate, with the owner of the cargo, has not been alleged, and is a position that could not be maintained; but it may safely, both on authority and on principle, be said, that in general it is his duty to do so, or it is his duty in general to attempt to do so. If, according to the circumstances in which he is placed, it is reasonable that he should, it was rational to expect that he might obtain an answer within a time not inconvenient with reference to the circumstances of the case; it must be taken, therefore, upon authority and principle, that it is the duty of the master to do so, or at least to make the attempt.

DURANTY V. HART. THE CARGO EX "HAMBOURG" ¹

54. The master of a vessel, without funds or credit, must communicate with the owners of the cargo before hypothecating the ship, freight and cargo, in order to enable him to pay the expense of the necessary repairs of the vessel. The principle is well known, but there may be exceptional circumstances, and the master is not bound to tranship his cargo even in a case where the ship and freight are of small value; his first duty is to carry the cargo to its destination in the same bottom, unless under the greatest difficulty.

LORD KINGSDOWN, p. 320:—It is not, however, difficult to collect what really was said by the learned judge ², and with a slight correction of the text it would stand thus:—"If according to the circumstances in which he is placed, it be reasonable that he should—if it be rational to expect that he may—obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt."

That this is the intention, and, therefore, the true wording of the passage, we have ascertained by communicating with the Lord Justice Knight Bruce who delivered the judgment.....

In the rule thus enunciated their Lordships are unable to discern any novelty, either in the principle on which it rests, or in its application to the case of the hypothecation of the cargo of a ship by the master.

The character of agent for the owners of the cargo is imposed

¹ Admiralty, 1863 Dec. 9, IX Moore N. S. 289.

² In the above case of the "*Bonaparte*."

RIGHT OF MASTER TO EFFECT LOANS.

upon the master by the necessity of the case, and by that alone. In the circumstances supposed something must be done, and there is nobody present who has authority to decide what shall be done. The master is invested by presumption of law with authority to give directions on this ground—that the owners have no means of expressing their wishes. But when such means exist, when communication can be made to the owners, and they can give their own orders, the character of agent is not imposed upon the master, because the necessity which creates it does not arise.

DROEGE V. STUART. THE "KARNAK" ¹

55. The extent of the authority conferred on the master of a vessel to bind the owners either of the ship or cargo, is derived from, and governed by the law of the flag; and the existence of the necessity which the Maritime law requires to validate the hypothecation of the ship and cargo by bottomry, is to be ascertained by evidence in the usual manner. The meaning of the term "necessity" in respect of hypothecation by the master, is analogous to its meaning in other parts of the law.

A ship was chartered from a port in the *United States*, to *Liverpool*. The vessel having in the prosecution of her voyage met with bad weather, and suffered damage, put into *Bermuda*, where the master incurred heavy expenses for repairs and supplies, and although he had before his departure received large sums of money on account of the freight, was left without means. The repairs were executed, and the supplies furnished, without any money raised by a bottomry bond; but, in *Bermuda*, the creditors had the right by law to arrest the ship for the repairs and supplies, and the master, not being able to pay the creditors and desiring to prosecute his voyage, wrote to the agent of the owners of the ship, and of the cargo, and not receiving any answer within a reasonable time, raised the funds necessary for the payment of such supplies on bottomry of the ship, cargo and freight.

56. On a suit brought by the assignees of the bond, the owners of the ship not opposing, the court below pronounced for the validity of the bond, so far as it regarded the ship, cargo and freight, and the ship was sold but did not realize sufficiently. The consignees of the cargo, who were also entitled to the freight, claimed to retain in their hands the amount of freight, with interest and insurance, advanced by them in part payment before the commencement of the voyage, and paid the freight, short of that

¹ Admiralty, 1869 June 5, VI Moore N. S. 136.

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amount, into court. The court below disallowed this abatement, and ordered the whole freight to be paid into court.

The Judicial Committee held that under the circumstances, the master was warranted in resorting to a bottomry bond, and that the necessity of the case warranted the hypothecation of the cargo as well as the ship and freight; that as the latter was, by the agreement between the charterer and the master, in part paid in advance, the retention of the amount of such prepayment by the consignees of the cargo should be upheld, as the master by hypothecating the chartered freight could give no right to more freight than the owner had a right to demand from the charterer.

BARRON V. STEWART. THE "PANAMA" ¹

57. Before resorting to bottomry for raising necessary supplies, it is absolutely necessary, except in circumstances where it is not practicable, that notice should be given by the master to the owner of the vessel, and an allegation that the latter was insolvent is no excuse for not communicating with him, unless he has been judicially declared insolvent and the ownership of the vessel has become vested in his assignees, to whom such notice must then be given.

LORD ROMILLY, p. 490:—It resolves itself, therefore, solely into a question of insolvency, and whether insolvency excuses the giving of notice, there having been no judicial insolvency. Their Lordships are of opinion, that if they were to lay down this as a principle, it would produce a serious evil. In the first place, it is very difficult to tell whether a person is insolvent. Is it to depend on the ultimate result of whether he was actually insolvent at the time, and that the opinion of the charterer was correct? The fact of whether a man is insolvent or not may depend upon the result of a single item in a contested account, which may involve a question of difficult legal decision. Insolvency, finally, may depend upon the expense of legal proceedings, and the time and manner of realizing the assets. These would have to be taken into account.

KLEINWORT V. CASSA MARITANA OF GENOA ²

58. A master cannot hypothecate a ship by a bottomry bond without communicating with his owner, if communication be practicable, and, *a fortiori*, cannot hypothecate the cargo without communicating with the owner of it, if this can be done. Such communications must be explicit and state not merely the necessity for expediture, but also the absolute necessity for hypothecation.

¹ Admiralty, 1870 June 20, VI Moore N. S. 484.

² Ceylon, 1877 Jan. 18, L. R. II Appeal Cases 156.

BOUNDARY

CONSTRUCTION OF TITLES AS TO

HENRICK V. SIXBY¹

59. An action *en bornage* was brought to determine the boundary line between the land of the plaintiff and that of the defendant, both of which properties were formerly one lot, and described as containing between 140 or 150 acres. This was afterwards sold in two lots. The plaintiff's land, to wit, the eastern portion, was described in the deeds as containing "90 acres, more or less." The defendant's, to wit, the western portion, "about fifty acres"; but the descriptions in the deeds did not agree as to where the line of boundary was to run. A land surveyor was appointed in court; he made a report which was homologated by the Superior court. The effect of the Surveyor's report, was to make a boundary line, by which the defendant got sixty-one acres, and the plaintiff's land was reduced to eighty-two acres.

The Judicial Committee, reversing the judgments of both courts below, held that the proper construction to ascertain the boundary line was to make the quantity conveyed agree with the quantity mentioned in the deed. The case was different from that of a conveyance of a certain ascertained piece of land accurately described by its boundaries on all sides, with a statement that it contained so many acres, "or thereabout," when, if the quantity was inaccurately stated, it did not affect the transaction.

SIR RICHARD T. KINDERSLEY, p. 370: — It is a clear principle that if one part of a deed is so ambiguously worded that it is equally capable of two different constructions, one of which is in accordance with, and the other conflicts with, another part of the deed, about the meaning of which there is no doubt, the former construction must be adopted as the right one, and (as an instance of the application of that general principle) if, in a deed conveying land, the description of the land intended to be conveyed is couched in such ambiguous terms that it is very doubtful what were intended to be the boundaries of the land, and the language of the description equally admits of two different constructions, the one of which would make the quantity of the land conveyed agree with the quantity mentioned in the deed, and the other would make the quantity altogether different, the former construction must prevail.

BREACH OF CONTRACT

See CONTRACT, DAMAGE.

BUILDER

RESPONSIBILITY. See ARCHITECT AND CONTRACTOR: *iusdem verbis*.

¹ Lower Canada, 1867 Feb. 4, IV Moore N. S. 349.

BURIALS

RIGHT TO ECCLESIASTICAL

BROWN V. LES CURÉ ET MARGUILLERS DE L'ŒUVRE ET FABRIQUE
DE NOTRE-DAME DE MONTRÉAL.¹

60 To justify the refusal by the Catholic church of ecclesiastical burial to the remains of one of its members, in the consecrated part of the cemetery where the deceased had bought a place to be buried in, it is necessary under the *Quebec* Ritual, which contains the law applicable to such case, that there should have been prior to the death of said member a sentence of excommunication by name, *nominatim*, published against him, or that he should have been adjudged to be *un pécheur public*.

61 A *Fabrique* may in their capacity be compelled by *mandamus* to give to a catholic deceased, burial in that part of the cemetery consecrated by the church, on payment of the accustomed dues.

SIR ROBERT PHILIMORE, p. 209: — Now, what is the question to be here decided? It is the right of Guibord to interment in the ordinary way in the cemetery of his parish, a right enforceable by his representative. It may be observed that the Curé and Marguilliers are only proprietors of the parochial cemetery in the sense in which a Parson in England is the owner of the freehold of the churchyard, that is to say, subject to the right of the parishioner to be buried therein. The respondents do not contest that Guibord had that right, but say that they have refused nothing but ecclesiastical burial, for the refusal of which they are responsible only to the religious, and not to the civil authority. They admit, however, that the consequence of the refusal of ecclesiastical burial is that the remains of the deceased can be interred only in the smaller or reserved portion of the cemetery. It cannot be doubted on the evidence that this qualification of the general right of interment, this separation of the grave from the ordinary place of sepulture, implies degradation, not to say infamy.

That forfeiture of the right to ecclesiastical burial, involving these consequences, may be legally incurred, is not denied by the appellants. Their contention is, that it was not so incurred by Guibord; that, according to the law of the religious community to which he belonged, he retained at the time of his death his right to be buried in the larger portion of the cemetery in the usual manner.

Their Lordships are disposed to concur, with one qualification, in the opinion expressed by Mr. Justice Berthelot as to the mixed character of these questions. He says:

"Le baptême, le mariage, et la sépulture sont de matière mixte, et les ecclésiastiques ne peuvent se refuser de les administrer à ceux de leurs paroissiens qui y ont droit, comme résidants dans l'enclave

¹ Quebec, 1874 Nov. 21, L. R. VI P. C. 157.

RIGHT TO ECCLESIASTICAL.

de sa paroisse, à moins cependant qu'il n'y ait des peines ecclésiastiques prononcées contre eux par l'évêque ou autre autorité ecclésiastique compétente."

If this passage is to be taken to imply that it is competent to the Bishop to deprive a Roman Catholic subject of his rights, by pronouncing against him *ex mero motu* ecclesiastical penalties, their Lordships are of opinion that the proposition is too wide. They conceive that, if the act be questioned in a Court of justice, that court has a right to inquire, and is bound to inquire, whether that act was in accordance with the law and rules of discipline of the Roman Catholic Church which obtain in Lower Canada, and whether the sentence, if any, by which it is sought to be justified, was regularly pronounced by an authority competent to pronounce it.

It is worthy of observation, as bearing both upon the question of the *status* of the Roman Catholic Church in Lower Canada, and the manner of ascertaining the law by which it is governed, that in the courts below, it was ruled, apparently, at the instance of the respondents, that the law, including the ritual of the Church, could not be proved by witnesses, but that the Courts were bound to take judicial notice of its provisions.

The application of this ruling would be difficult, unless it be conceded that the ecclesiastical law which now governs Roman Catholics in Lower Canada is identical with that which governed the French province of Quebec. If modifications of that law have been introduced since the session, they have not been introduced by any legislative authority. They must have been the subject of something tantamount to a consensual contract, binding the members of that religious community, and, as such ought, if invoked in a Civil court, to be regularly proved.

It seems, however, to be admitted on both sides that the law upon the point in dispute is to be found in the Quebec ritual, which was certainly accepted as law in Canada before the cession of the province, and does not differ in any material particular from the Roman ritual also cited in the courts below. The Quebec ritual is as follows :

"On doit refuser la sépulture ecclésiastique,—1^o aux Juifs, aux infidèles, aux hérétiques, aux apostats, aux schismatiques, et enfin à tous ceux qui ne font pas profession de la religion catholique, 2^o Aux enfants morts sans baptême. 3^o A ceux qui auraient été *nommément* excommuniés ou interdits, si ce n'est qu'avant de mourir ils aient donné des marques de douleur, auquel cas on pourra leur accorder la sépulture ecclésiastique, après que la censure aura été levée par nos ordres. 4^o A ceux qui se seraient tués par colère ou par désespoir, s'ils n'ont donné avant leur mort des marques de contrition ; il n'en est pas de même de ceux qui se seraient tués par frénésie ou accident, auxquels cas on la doit accorder. 5^o A ceux qui ont été tués en duel, quand même ils auraient donné des marques de repentir avant leur mort. 6^o A ceux qui, sans excuse légitime, n'auront pas satisfait à leur devoir pascal, à moins qu'ils n'aient donné des marques de contrition. 7^o A ceux qui sont morts notoirement coupables de quelque péché mortel, comme si un fidèle avait refusé de se confesser, et de recevoir les autres sacrements avant

RIGHT TO ECCLESIASTICAL.

que de mourir, s'il était mort sans vouloir pardonner à ses ennemis, s'il avait été assez impie pour blasphémer sciemment et volontairement sans avoir donné aucun signe de pénitence. Il ne faudrait pas user de la même rigueur envers celui qui aurait blasphémé par folie ou par la violence du mal, car en ce cas les blasphèmes ne seraient pas volontaires, ni par conséquent des péchés. 8^o Aux pécheurs publics qui seraient morts dans l'impénitence; tels sont les concubinaires, les filles ou femmes prostituées, les sorciers et les farceurs, usuriers, etc. A l'égard de ceux dont les crimes seraient secrets, comme on ne leur refuse pas les sacrements, on ne doit pas aussi leur refuser la sépulture ecclésiastique. Pour ce qui est des criminels qui auront été condamnés à mort et exécutés par ordre de la justice, s'ils sont mort pénitents, on peut leur accorder la sépulture ecclésiastique, mais sans cérémonie. Le curé ou vicaire y assiste sans surplis, et dit les prières à voix basse. Quand il y aura quelque doute sur ces sortes de choses, les curés nous consulteront ou nos grands vicaires."

The refusal of ecclesiastical burial of Guibord is not justified, and could not have been justified by either the 1st, 2nd, 4th, or 7th of the above rules.

To bring him within the 3rd rule, it would be necessary to show that he was excommunicated by name. That such a sentence of excommunication might be passed against a Roman Catholic in Canada and that it might be the duty of the Civil Courts to respect and give effect to it, their Lordships do not deny. It is no doubt true, as has already been observed, that there are now in Canada no regular ecclesiastical courts, such as existed and were recognized by the state when the province formed part of the dominions of France. It must, however, be remembered that a Bishop is always a *judez ordinarius*, according to the canon law; and according to the general canon law, may hold a Court and deliver judgment if he has not appointed an official to act for him. And it must further be remembered that, unless such sentence were recognized, there would exist no means of determining amongst the Roman Catholics of Canada the many questions touching faith and discipline which, upon the admitted canons of their Church, may arise amongst them. There is, however, no proof that any sentence of excommunication was ever passed against Guibord *nominatim* by the Bishop or any other ecclesiastical authority. Indeed, it was admitted at the Bar that there was none; their Lordships are, therefore, relieved from the necessity of considering how far such a sentence, if passed, might have been examinable by the Temporal Court, when a question touching its legal effect and validity was brought before that Court.

It should be borne in mind that an issue was distinctly raised by the pleadings upon the fact of such a sentence; and the necessity of such a sentence to justify the refusal seems to be, to some extent, admitted by the allegation in the defendant's pleading that (*le décret*), as it is there called, of the Administrator-General was *un décret nominal*.

In the course of the argument it was suggested, rather than argued, that the refusal of ecclesiastical burial in Guibord's case

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might be brought within the 6th of the above rules, and justified on the ground that, without legitimate reason, he had failed to communicate at Easter. But upon this their Lordships have to observe that this failure was not the ground on which ecclesiastical burial was denied to him, and that so far from wilfully abstaining from receiving the sacraments of the Church those sacraments were refused to him when he desired to receive them, simply because he continued to be a member of the Institute.

The cause of refusal finally insisted upon was that Guibord was "un pécheur public" within the meaning of the 7th rule.

This defence was set up for the first time in the replication.

The Administrator-General's evidence on the point should be noticed:—

"**QUESTION.**—Pour quelle raison feu Joseph Guibord, comme membre de l'Institut Canadien, ne pouvait-il pas être admis aux sacrements de l'Eglise ?

"**RÉPONSE.**—Parce que, comme tel, il est considéré comme pécheur public. On entend par pécheur public celui qui, pour une raison connue publiquement, ne peut participer aux sacrements de l'Eglise. M. Joseph Guibord, en appartenant à l'Institut Canadien, appartenait à un Institut qui se trouvait, comme il se trouve encore, sous les censures de l'Eglise, par la raison qu'il possède une bibliothèque contenant des livres défendus par l'Eglise sous peine d'excommunication, *lata sententia* encourue *ipso facto*, et réservée au Pape, par le fait de la possession des dits livres. Cette espèce d'excommunication s'encourt par le fait même, dès que l'on connaît la loi de l'Eglise qui en défend la lecture et la retenue, dès que cela parvient à la connaissance de ceux qui les possèdent. Cette excommunication a atteint M. Guibord par le fait même qu'il était membre de l'Institut. Lorsqu'on est sous l'effet de la dite excommunication, quoique l'on puisse continuer à être membre de l'Eglise Catholique, et que, de fait, l'on continue à en être membre, l'on est privé de la participation aux sacrements, ce qui entraîne la privation de la sépulture ecclésiastique. Voilà pourquoi cette espèce de sépulture a été refusée à M. Guibord."

The evidence continues—

"**QUESTION.**—Le dit feu Joseph Guibord, comme membre de l'Institut Canadien, était-il sous l'effet de l'excommunication, en vertu de quelque règle générale de l'Eglise seulement, ou en conséquence de quelque décret particulier ?

"**RÉPONSE.**—Il y était d'abord en vertu de la loi générale de l'Eglise, et en vertu de l'application qu'en a fait l'Evêque de Montréal par son mandement."

The evidence further continues.

"**QUESTION.**—A quel mandement faites-vous allusion ?

"**RÉPONSE.**—C'est à celui produit en cette cause comme l'Exhibit B. de la demanderesse.

"**QUESTION.**—Est-il déclaré quelque part dans aucun mandement ou lettre pastorale émanant de l'Evêque de Montréal que le fait d'appartenir à l'Institut Canadien entraîne l'excommunication, et si

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vous répondez affirmativement, veuillez indiquer les termes qui décrètent telle chose?

"RÉPONSE.—Ceci est déclaré dans l'annonce de Monseigneur de Montréal, que, en ma qualité d'administrateur, j'ai fait publier le quatorze août, mil huit cent soixante-et-neuf, laquelle annonce est produite comme pièce D. de la demanderesse. Voici dans quels termes ceci est déclaré: "Ainsi, nos très chers frères, deux choses sont ici spécialement et strictement défendues, savoir: 1, de faire partie de l'Institut Canadien tant qu'il enseignera des doctrines pernicieuses; et 2, de publier, retenir, garder, lire l'*Annuaire* du dit Institut pour 1868. Ces deux commandements de l'Eglise sont en matière grave, et il y a par conséquent un grand péché à les violer sciemment. En conséquence, celui qui persiste à vouloir demeurer dans le dit Institut, ou à lire ou seulement garder le susdit *Annuaire*, sans y être autorisé par l'Eglise, se prive lui-même des sacrements, même à l'article de la mort, parce que, pour être digne d'en approcher, il faut détester le péché, qui donne la mort à l'âme, et être disposé à ne plus le commettre."

"QUESTION.—Être privé des sacrements et être excommunié, est-ce la même chose?

"RÉPONSE.—Dans le cas présent c'est la même chose?

"QUESTION.—L'excommunication peut-elle être prononcée sans qu'il soit même fait usage du mot?

"RÉPONSE.—Je ne suis pas prêt à répondre à cette question." — (Record, 146, 7.)

It is impossible wholly to avoid a suspicion that it had originally been intended to rely on an *ipso facto* excommunication, and that the subsequent defense of "pécheur public" was resorted to when it became manifest that a sentence of excommunication was necessary and that none had been pronounced.

What is this category of "pécheur public" to include? Is the category capable of indefinite extension by means of the use of an *et cætera* in the Public Ritual? Or, if the force of an *et cætera* is to be allowed to bring a man within the category of person liable to what in ecclesiastical law is a criminal penalty, must it not be confined to offences *ejusdem generis*, as those specified? Guibord's case did not come within any of the enumerated classes.

Some argument was raised as to the effect of the words, "quand il y aura quelque doute sur ces sortes de choses les Curés nous consulteront ou notre grand Vicaire;" but their Lordships are of opinion that these words can at most imply a duty on the part of the Curé to consult the Ordinary as to the application of the law in doubtful cases, not a power on the part of the Ordinary to enlarge the law in giving these directions, or to create a new category of offenders.

To allow a discretionary addition to, or an enlargement of the categories specified in the Ritual, would be fraught with the most startling consequences. For instance, the *et cætera* might be, according to the supposed exigency of the particular case, expanded so as to include within its bann any person being in habits of intimacy or conversing with a member of a literary society containing a pro-

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hibited book; any person sending his son to a school in the library of which there was such a book; going to a shop where such books were sold; and many other instances might be added. Moreover, the index, which already forbids Grotius, Pascal, Pothier, Thuanus, and Sismondi, might be made to include all the writings of jurists and all legal reports of judgments supposed to be hostile to the Church of Rome; and the Roman Catholic lawyer might find it difficult to pursue the studies of his profession.

Their Lordships are satisfied that such a discretionary enlargement of the categories in the Ritual would not have been deemed to be within the authority of the Bishop by the law of the Gallican Church as it existed in Canada before the cession; and, in their opinion, it is not established that there has been such an alteration in the *status* or law of that Church founded on the consent of its members, as would warrant such an interpretation of the Ritual, and that the true and just conclusion of law on this point is, that the fact of being a member of this Institute does not bring a man within the category of a public sinner, to whom Christian burial can be legally refused.

It would further appear that, according to the ecclesiastical law of France, a personal sentence was in most cases required in order to constitute a man a public sinner.

Jean de Pontas (Article 2, des *Cas de Conscience*, vo. *Sépulture*, A. D. 1715, Record 245) says:—

“Un homme, en France, n'est point censé pécheur public, et ne peut être traité comme tel, à moins qu'il n'y ait une sentence déclaratoire rendue par le jugement ecclésiastique contre le coupable.

“A propos d'un concubinaire public, pendant près de dix ans, mort enduré dans le crime, sans avoir voulu se confesser, Pontas décide que “le curé doit enterrer cet homme en observant toutes les formalités pratiquées par l'Eglise, sans pouvoir ni s'absenter, ni feindre de refuser la sépulture ecclésiastique, sous prétexte d'intimider les autres pécheurs semblables, ni enfin ordonner à un autre prêtre de l'enterrer sans observer les cérémonies ordinaires.”

Durand de Maillane (Droit Canonique, t. 5, p. 442) says:—

“On ne reconnaît pour véritables excommuniés à fuir, que les Payens et les Juifs, ou les hérétiques condamnés et séparés ainsi totalement du corps des fidèles. Les autres coupables de différents crimes qu'ils n'expient point avant leur mort ne sont privés de la sépulture que lorsqu'ils sont dénoncés excommuniés, ou que leur impénitence finale est tellement notoire qu'on ne peut absolument s'en déguiser la connaissance. Le moindre doute tire le défunt hors du cas de privation, parce que chacun est présumé penser à son salut.

“Suivant les maximes du royaume, on ne prive de la sépulture ecclésiastique que les hérétiques séparés de la communion de l'Eglise, et les excommuniés dénoncés. La notoriété sur cette matière n'est pas absolument requise, parce qu'il y a des cas où il est très nécessaire de faire respecter à cet égard les saintes lois de l'Eglise; mais elle n'est pas aisément reçue, à cause des inconvénients qui pourraient en résulter; car le refus de la sépulture est regardé parmi nous comme une telle injure, ou même comme un tel crime, que chaque fidèle, pour l'honneur de la religion, et la mémoire ou même

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le bien de son frère en Jésus-Christ, est recevable à s'en plaindre. Cette plainte se porte devant des juges séculiers, parce qu'elle intéresse en quelque sorte le bon ordre dans la société, et l'honneur même de ses membres."

Héricourt (Lois Ecclésiastiques, p. 174:—)

"Avant de dénoncer excommunié celui qui a encouru une excommunication *lata sententia*, il faut le citer devant le juge ecclésiastique, afin de justifier le crime qui a donné lieu à la censure et d'examiner s'il n'y aurait pas quelque moyen de défense légitime à proposer."

No personal sentence, such as is contemplated by these authorities, was, as already pointed out, ever passed against Guibord.

It is also to be borne in mind that no sentence, whatever might have been its value, was passed even after Guibord's death. There is indeed a letter called a *decret* of the Administrator-General to the Curé, which, after referring to a letter of the Bishop, written before Guibord's death, refuses ecclesiastical sepulture to him as a member of the Institute. The representatives of Guibord were neither summoned nor heard. This so-called *decret* had none of the essential elements of a judicial sentence.

It remains for their Lordships to consider what is the substantive law upon which the respondents rely in support of their contention that Guibord is to be considered a public sinner within the terms of the Quebec ritual.

They appear to place their principal reliance on Rule X of the Council of Trent:—

"Omnibus fidelibus præcipitur ne quis audeat contra harum regularum prescriptum, aut hujus Indicis prohibitionem libros aliquos legere aut habere.

"Quod si quis libros hereticorum vel cujusvis auctoris scripta ob heresim vel ob falsi dogmatis suspicionem damnata, atque prohibita legerit vel habuerit, statim in excommunicationis sententiam incurrat."

Various observations arise on this citation, which seem to deprive it of all authority in the present case.

In the first place it is a matter almost of common knowledge, certainly of historical and legal fact, that the decrees of this Council, both those that relate to discipline and to faith, were never admitted in France to have effect *proprio vigore*, though a great portion of them has been incorporated into French Ordinances; in the second place, France has never acknowledged nor received, but has expressly repudiated, the decrees of the Congregation of the Index.

Gibert, in his Institutes, says that the *ipso facto* excommunication inflicted by the Council of Trent, as the punishment of reading or possessing prohibited books, would have no effect in France *dans le for extérieur*. *Dupin*, a jurist already mentioned, denies the authority in France of the decrees of the Congregation. He says:—

"En effet, en consultant les précédents, on trouve un célèbre arrêt du Parlement de Paris qui l'a jugé ainsi en 1647, après un éloquent plaidoyer de l'Avocat Général Omer Talon :

"Nous ne reconnaissons point en France," dit ce Magistrat, "l'autorité, la puissance, ni la juridiction des congrégations qui se tiennent à Rome; le Pape peut les établir comme bon lui semble dans ses

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Etats; mais les décrets de ces congrégations n'ont point d'autorité ni d'exécution dans le royaume Il est vrai que dans ces congrégations se censurent les livres défendus, et dans icelles se fait l'*index expurgatorius*, lequel s'augmente tous les ans; et c'est là où autrefois ont été censurés les arrêts de cette Cour rendus contre Chastel, les œuvres de M. le Président de Thou, les libertés de l'Eglise Gallicane, et les autres livres qui concernent la conservation de la personne de nos rois et l'exercice de la justice royale."—&c.—(Dupin, Droit Public Ecclésiastique, avertissement sur la 4ème édition.)

No evidence has been produced before their Lordships to establish the very grave position that Her Majesty's Roman Catholic subjects in Lower Canada have consented, since the cession, to be bound by such a rule as it is now sought to enforce, which, in truth, involves the recognition of the authority of the Inquisition, an authority never admitted but always repudiated by the old law of France. It is not, therefore, necessary to enquire whether since the passing of the 14 Geo. III, c. 83, which incorporates (s. 5) the 1st of Elizabeth, already mentioned, the Roman Catholic subjects of the Queen could or could not legally consent to be bound by such a rule.

The conclusion, therefore, to which their Lordships have come upon this difficult and important case is that the respondents have failed to show that Guibord was, at the time of his death, under any such valid ecclesiastical sentence or censure as would, according to the Quebec ritual, or any law binding upon Roman Catholics in Canada, justify the denial of ecclesiastical sepulture to his remains.

It is, however, suggested that the denial took place, in fact, by the order of the Bishop or his Vicar-General; that the respondents are bound to obey the orders of their ecclesiastical superior; and, therefore, that no mandamus ought to issue against them. Their Lordships cannot accede to this argument. They apprehend that it is a general rule of law in almost every system of jurisprudence that an inferior officer can justify his act or omission by the order of his superior only when that order has been regularly issued by competent authority.

The argument would, in fact, amount to this: that even if it were clearly established that Guibord was not disentitled by the law of the Roman Catholic Church to ecclesiastical burial, nevertheless the mere order of the Bishop would be sufficient to justify the Curé and Marguilliers in refusing to bury him in that part of the parochial cemetery in which he ought on this hypothesis to be interred; or, in other words, the Bishop, by his own absolute power in any individual case, might dispense with the application of the general ecclesiastical law, and prohibit upon any grounds revealed, satisfactory to himself, the ecclesiastical burial of any parishioner. There is no evidence before their Lordships that the Roman Catholics of Lower Canada have consented to be placed in such a condition.

BY-LAWS

See CORPORATION (MUNICIPAL): *powers of*

BROKER

See PRINCIPAL AND AGENT.

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CAPE BRETON

CONSTITUTION OF

In re THE ISLAND OF CAPE BRETON¹

1. The Island of Cape Breton, ceded by France to England by the treaty of Paris, in 1763, was annexed to Nova Scotia by the proclamation of 1763 with a constitution composed of a Lieutenant-Governor, a council and an assembly; but this proclamation was never put into operation. By another proclamation of 1820, the Island was completely annexed to Nova Scotia, this new proclamation containing no provision as to interior administration. The Judicial Committee held that the Island was not entitled to a separate constitution.

CAPIAS

ISSUING OF *See* APPEAL: *in matters of penalty.*

¹ Cape Breton, 1846 April 7, V Moore 259.

ISSUING OFBANK OF BRITISH NORTH AMERICA V. STRONG ¹

2. The law in requiring an affidavit from the creditor for the issuing of a writ of *capias*, that he fears the debt will be lost unless the debtor is immediately arrested, has reference to a loss of the debt, so far as the debtor himself is concerned as well as with regard to any security which he may have given for the debt.

3. The holder of a promissory note, although secured by endorsers, may take a *capias* against the debtor and give the ordinary affidavit including the required words to the effect that he believes that without the benefit of the attachment the plaintiff will lose his debt or sustain damage; and this writ cannot be contested on the sole ground that the creditor could not swear that he feared his debt might be lost, because he might be paid by the endorsers.

CARGO

See AFFREIGHTMENT, BOTTOMRY AND RESPONDENTIA, COLLISION, MERCHANT SHIPPING.

CARRIER

DELIVERY. See AFFREIGHTMENT: *damage for delay in shipping*, MERCHANT SHIPPING: *duties and liabilities of owners masters and pilots*.

NEGLIGENCE. See COLLISION: *parties in fault*.

RESPONSIBILITY OFTHE PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY V. SHAND ²

4. According to the English law, carriers have the right to limit their responsibility by special agreement; and a limitation of responsibility imposed by the stipulations written on the ticket delivered to the forwarding party, which ticket must be considered as the contract between the parties, with regard to any loss, exempts the company from responsibility for the loss of baggage, when no fault is proved against the company.

OHRLOFF V. BRISCALL. THE "HELENE" ³

5. A bill of lading delivered to the owner of 47 casks of oil to be shipped from London to Liverpool, contained in

¹ Halifax, 1876 Feb. 10, L. R. I Appeal Cases 307.

² Mauritius, 1865 June 23, III Moore N. S. 273.

³ Admiralty, 1866 August 4, XIV Law Times N. S. 873.

RESPONSIBILITY OF

the margin the words: "not accountable for leakage." The oil was stowed alongside of rags and wool, which formed part of the cargo and belonged to same person as the oil. During the voyage nearly half of the oil leaked, owing to the heat caused by the wool. Neither shippers nor shipowners knew of the risk of stowing oil with wool. The charterers were frequently on board during the loading, and there was no fault found or complaint made as to the mode of stowage.

The Judicial Committee held that the ignorance on the part of the shipowners of the risk of stowing the two materials together did not amount to negligence on their part, and even if they had known such risk, the mere fact of the shipowner not putting up bulkheads was no evidence of negligence.

6. The word "leakage" in the bill of lading was not confined to "ordinary leakage," but included leakage without limit. And, moreover, the memorandum on the bill of lading protected the shipowner as to all leakage, except that caused by negligence, and, therefore, if there was no negligence shown, there was no cause of action.

MOFFATT V. BATEMAN¹

7. Action for negligence by the defendant in conveying the plaintiff, who was a decorator and gardener in his service, to perform for him certain work. The defendant drove, and while on the road the kingbolt of the carriage broke, the horses bolted, the carriage was overturned, and the plaintiff injured. There was no evidence of gross neglect on the part of the defendant.

In the absence of any evidence of gross negligence on the part of the defendant, the plaintiff was held not entitled to recover damages; and the evidence did not disclose such negligence as to render the defendant, performing a gratuitous service for the plaintiff, responsible.

THE "IDA"²

8. A bill of lading containing the words "*shipped in good order and condition by...*" but on the face of which the master of the vessel had written the words "*ignoro qualita e quantita*," cannot be taken as a *prima facie* admission of the state of the cargo at the time of the shipping.

9. When the plaintiff in an action of damages against a carrier does not prove that the goods were delivered in

¹ Victoria, 1869 Dec. 14, VI Moore N. S. 369.

² Admiralty, 1875 March 23, XXII Law Times N. S. 541.

RESPONSIBILITY OF

good order, he cannot succeed unless he proves that the damages have been caused by the fault of the carrier.

MOORE V. HARRIS¹

10. A master of an English ship made, in England, a contract to carry certain packages of tea to Toronto; the goods to be delivered at Montreal at a railway station. The bill of lading had the following clause: "*No damage that can be insured against will be paid for, nor will any claim whatever be admitted unless made before the goods are removed.*"

It was held that under the law of England, which is applicable in these cases, this condition, although in its first clause limited to insurable damage, applied as regards its second clause to all damages, whether apparent or latent.

11. As a matter of fact, their Lordships considered that the damage in this cause might have been discovered before the removal of the goods by an examination of the packages conducted with reasonable care and skill.

SIR MONTAGUE E. SMITH, p. 329: — A shipowner may choose to say, I will not be liable for any damage to an article of this kind, unless a claim is made so that it may be looked into and checked by my agents before the goods are removed from their control, and when a condition to this effect is found in a bill of lading, expressed in language which in its ordinary and natural sense includes all damages, whether latent or not, can the courts undertake to say it is so unreasonable that the parties could not have meant what they have said? No doubt this condition may bear hardly on consignees, but so also may the very large exceptions to the responsibility of the shipowner inserted in the body of this bill of lading. Certainly no reason for narrowing the scope of the condition can be gathered from the general tenor of the instrument, which is manifestly framed throughout with a view to exempt the shipowner (as far as could be foreseen) from liability for damage. It may be that this has been done to an unreasonable extent, but the plaintiffs are merchants and men of business, and cannot be relieved from an improvident contract, if it really be improvident. Possibly in shipping under bills of lading thus framed, the merchant gets a corresponding advantage in a lower rate of freight.

CAUTIONNEMENT

See SURETYSHIP.

CERTIORARI**APPEAL IN**

BOSTON V. LELIÈVRE²

12. No appeal lies from the Superior Court to the Court of Queen's Bench in the Province of Quebec in matters of certiorari.

¹ Quebec, 1876 April 7, L. R. I Appeal Cases 318.

² Quebec, 1870 Jan. 25, VI Moore N. S. 427.

POWER TO ISSUE

THE COLONIAL BANK OF AUSTRALASIA V. WILLAN¹

13. When the power to issue certiorari is taken away by statute or when it is not given, a Superior court is not absolutely deprived of the power to issue the writ; but its action as to the writ is controlled and limited, and it cannot quash an order or a judgment complained of by certiorari, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made the order, or of manifest fraud in the party procuring it.

CEMETERY

See BURIALS: *right to ecclesiastical.*

CLOSING OF. *See* CORPORATION (MUNICIPAL): *powers of.*

CHAMPERTY AND MAINTENANCE

WHAT IS

FISCHER V. NAICKER²

14. Champerty and maintenance is an immoral contract, contrary to public policy; it promotes unnecessary litigation, and is null in law.

LORD KINGSDOWN, p. 96:—The court seem very properly to have considered that the champerty, or more properly, the maintenance into which they were inquiring, was something which must have the qualities attributed to champerty or maintenance by the English law: it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary.

RAM COOMAR COONDoo V. CHUNDER CANTO MOCKERJEE³

15. Their Lordships, after the examination of a great number of cases decided in India, held that the English law of maintenance and champerty is not in force as specific law in India.

16. Nevertheless, a contract of this nature, even in India, ought to be held null and void as being against public policy. But, a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se*, opposed to public policy.

SIR MONTAGUE E. SMITH, p. 210:—Indeed, cases may be easily supposed in which it would be in furtherance of right and justice.

¹ Victoria, 1874 March 23, L. R. V. P. C. 417.

² Madras, 1860 March 7, II Law Times N. S. 94.

³ Bengal, 1876 Nov. 25, L. R. II Appeal Cases 186.

WHAT IS

and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.

But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the *bonâ fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purposes of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy,—effect ought not to be given to them.

CESSION DE BIENS

See ABANDONMENT OF PROPERTY, INSOLVENCY.

CHATTEL MORTGAGE**CONSTRUCTION OF**

WEBSTER V. POWER ¹

17. A mortgage was given on a certain number of branded sheep and herds of cattle on a Run in the colony, with the issue, increase, and produce thereof.

Held that the mortgage was limited to the issue and increase of such specific sheep, and did not include any sheep afterwards brought upon the Run, though in substitution of those specified in the original mortgage.

POSSESSION IN

TATHORN V. ANDREE ²

18. In Ceylon, where the Roman-Dutch laws prevail, possession is not required for the validity of a chattel mortgage, duly made in writing before a notary or created by the effect of law, not only against the debtor himself, but against his general creditors, even in the hands of a *bonâ fide* purchaser, without notice. But the rule has been modified by legislation to this extent: that if goods left in the possession of a mortgagee are sold, or mortgaged by him to another person, they cannot be followed into the hands of such transferee for value; but the contract is binding on the debtor, and the goods themselves may be taken if they remain in his hands.

CHARTER PARTY

See AFFREIGHTMENT.

CHILDREN

19. Does the word children, *enfants*, used in a will apply to the grand-children, *petits-enfants*? See WILL: construction of will, CROWN LANDS, FILIATION, LEGACY.

¹ New South Wales, 1868 March 13, V Moore N. S. 92.

² Island of Ceylon, 1863 July 15, I Moore N. S. 386.

CHURCH

STATUS OF CATHOLIC CHURCH IN CANADA.

BROWN v. LES CURÉ ET MARQUILLERS DE L'ŒUVRE ET
FABRIQUE DE NOTRE-DAME DE MONTRÉAL.¹

20. After the cession of Canada by France to England, by the treaty of Paris, the Roman Catholic Church in Canada has ceased to be an established Church or a state Church, but it has continued to be a Church recognized by the state, and it has, moreover, retained its endowments, dues and privileges with the right to enforce them at law.

21. The civil courts in Canada cannot enforce the "*appel comme d'abus*"; but they may review the law and jurisprudence relating to those appeals and apply them in a civil suit, as far as they are applicable, with the Church.

22. In such suit where the right of the civil courts to entertain an appeal "*comme d'abus*" is in question, a judge cannot be recused because he is a Roman Catholic.

23. Their Lordships made the following remarks touching the status, at the present time, of the Roman Catholic Church in Canada.

SIR ROBERT PHILLIMORE, p. 204:—It is certain that before the cession (1762) the established church of that province, as in the kingdom of France itself, was the Roman Catholic church; its law, however, being modified by what were known as "*les libertés de l'église gallicane*." There seem also to have been regular ecclesiastical courts, and besides them there was vested in the Superior Council of Canada the jurisdiction recognized in French jurisprudence and enforced by the parliaments of France as the "*appellatio tanquam ab abusis*" or the "*appel comme d'abus*," Dupuis, *Manuel de Droit public ecclésiastique français*, 1845, art. 79. The following are the public documents which shew how the Roman Catholic church in Lower Canada was dealt with on the conquest and cession of the province

From these documents² it would follow that, although the Roman Catholic church in Canada may on the conquest have ceased to be an established church in the full sense of the term, it nevertheless, continued to be a church recognized by the State; retaining its endowments, and continuing to have certain rights (e. g. the perception of "*dîmes*" from its members) enforceable at law.

It has been contended on behalf of the appellants that the effect of the Act of Cession, the Treaty, and subsequent legislation, has been to leave the law of the Roman Catholic church as it existed

¹ Quebec, 1874 Nov. 21, L. R. VI P. C. 157.

² Deed of Cession, 27th article; Treaty of 1793; 14 Geo. 3, ch. 83, 1774.

STATUS OF CATHOLIC CHURCH IN CANADA.

and was in force before the cession, to secure to the Roman Catholic inhabitants of Lower Canada all the privileges which their fathers, as French subjects, then enjoyed under the head of the liberties of the Gallican church; and further, that the Court of Queen's Bench, created in 1794, possessed, and that the existing Superior Court now possesses, as the Superior Council heretofore possessed, the power of enforcing these privileges by proceedings in the nature of *appel comme d'abus*. Considering the altered circumstances of the Roman Catholic church in Canada, the non-existence of any recognized ecclesiastical courts in that province, such as those in France which it was the office of an *appel comme d'abus* to control and keep within their jurisdiction; and the absence of any mention in the recent Code of Procedure for Lower Canada of such a proceeding, their Lordships would feel considerable difficulty in affirming the latter of the above propositions. Mr. Justice Mondelet, indeed, refers in his judgment to various cases of a mixed character¹ in which the civil courts appear at first right to have recently exercised a jurisdiction somewhat analogous to that exercised in the *appel comme d'abus*. But on examination, these cases prove to be suits of a different character, actions for damages against spiritual persons for wrongs done by them in their spiritual capacities.

Their Lordships do not, however, think it necessary to express any opinion as to the competence of the civil courts to entertain a suit in the nature of the "*appel comme d'abus*," as they agree with Mr. Justice Mackay and other judges of the Court of Revision, that in such a suit the procedure must be different from the present, and that at least it would be necessary to bring the proper ecclesiastical authorities before the court as defendants.

It is another and a different question, to be considered hereafter, whether the jurisprudence and precedents relating to the "*appel comme d'abus*" may not be considered by their Lordships as evidencing the law of the church in Canada, by the maladministration of which the Appellant complains that he has been wronged.

Nor do their Lordships think it necessary to pronounce any opinion upon the difficult questions which were raised in the argument before them touching the precise *status*, at the present time, of the Roman Catholic Church in Canada. It has, on the one hand, undoubtedly, since the cession, wanted some of the characteristics of an established church; whilst, on the other hand, it differs materially in several important particulars from such voluntary religious societies as the Anglican Church in the colonies, or, the Roman Catholic Church in England. The payment of "dimes" to the clergy of the Roman Catholic Church by its lay members; and the rateability of the latter to the maintenance of parochial cemeteries, are secured by the law and statutes. These rights of the church must beget corresponding obligations, and it is obvious that this

¹ *Wurtèle v. Bishop of Quebec*, *Décision des Tribunaux*, vol. II, p. 68; *Jarret v. Sénécal*, 4 L. C. J. 213; *Larocque v. Michon*, 1 L. C. J. 181.

STATUS OF CATHOLIC CHURCH IN CANADA.

state of things may give rise to questions between the laity and clergy which can only be determined by the municipal courts. It seems, however, to their Lordships to be unnecessary to pursue this question, because even if this church were to be regarded merely as a private and voluntary religious society resting only upon a consensual basis, courts of justice are still bound, when due complaint is made that a member of the society has been injured as to his rights, in any matter of a mixed spiritual and temporal character, to inquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury.

In the case of "*Long v. the Bishop of Cape-Town*," their Lordships said:—

"The Church of England, in places where there is no church established by law, is in the same situation with any other religious body—in no better, but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who, expressly or by implication, have assented to them. It may be further laid down that, where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation; the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and if not, has proceeded in a manner consonant with the principles of justice."—(1 Moore, N. S., 461.)

Their Lordships will bear in mind these principles in the judgment which they are about to pronounce.

STATUS OF PRESBYTERIAN CHURCH IN CANADA.

DOBIE V. BOARD FOR THE MANAGEMENT OF THE TEMPORALITIES
FUND OF THE PRESBYTERIAN CHURCH OF CANADA ¹

24. The Presbyterian Church, being a non-established Church, its constitution, that is, the terms of the contract under which its members are associated, must be gathered from the proceedings and practice of its judicatories, in the absence of formal documents.

25. Every person who becomes a member of a non-established Presbyterian Church must be held to have satisfied himself in regard to the proceedings and practice of its courts and to adhere to them and to the precedents which have been established.

26. The minutes of "The Presbyterian Church of Canada in connection with the Church of Scotland" afford evidence

¹ Quebec, 1832 Jan. 21, L. R. VII Appeal Cases 136.

STATUS OF PRESBYTERIAN CHURCH IN CANADA.

to the effect that, in all matters which its Synod was competent to deal with and determine, the will of the majority as expressed by their vote was binding upon every member of the Synod.

CIVIL STATUS

See ALIEN, CHURCH, INTERNATIONAL LAW, MINORITY.

CODES OF LAW**CONSTRUCTION OF CANADIAN**

HUTCHINSON V. GILLESPIE ¹

27. The old French law down to the cession of Canada to England, in 1763, is the law prevailing in Lower Canada; but the *Ordonnances* not registered never became law in this province, as it is a principle of the French law that all *Ordonnances* not registered, are void.

28. The Judicial Committee have in the following cases applied general rules of construction to the Canadian Code Civil and Code of Civil Procedure, or construed some special words contained in them in a general manner.

HERSE V. DUBAUX ²

SIR JAMES COLVILLE, p. 310:—Their Lordships are of opinion that for the law which obtains in *Lower Canada* they ought to look, in the first instance, to the Civil Code of that province, which, though enacted after the commencement of this action, is admitted to be, when the contrary is not expressed, declaratory only of the law as it previously existed, and if this be so, it follows that the works of learned French authors, whether written before or after the promulgation of the *Code Napoléon* are useful only in so far as they explain what may be ambiguous or doubtful in the Canadian Code; they cannot control its plain letter or express provisions.

ABBOTT V. FRASER ³

SIR MONTAGUE SMITH, p. 117:—The Civil Code (which was promulgated before the date of Mr. Fraser's will) is the primary source from which the law of Lower Canada is now to be drawn. When this Code contains rules on any given subject complete in themselves, they alone are binding, and cannot be controlled by the pre-existing laws on the subject, which can then be properly referred to only to elucidate, in cases of doubtful construction, the language of the Code. On the other hand, when the Code refers to existing laws, not formulated in its articles, or in so far as on any subject it is silent, inquiry is permissible into the old law, and it will in many cases become a question of construction what and how much of that law remains in force, or is abrogated as being contrary to or inconsistent with the provisions of the Code. (See article 2613.)

¹ Lower Canada, 1844 May 9, IV Moore 378.

² Lower Canada, 1872 Nov. 9, IX Moore N. S. 281.

³ Quebec, 1874 Nov. 26, L. R. VI P. C. 96.

CONSTRUCTION OF CANADIAN

EXCHANGE BANK OF CANADA V. THE QUEEN¹

29. LORD HOBHOUSE, p. 167:—Coming down to its special use in the instrument now being construed, their Lordships have found many passages in the Civil Code where the words "comptable" and "compte" are used strictly of those who are bound to account for particular transactions: as of a tutor, art. 308 *et seq.*; of an *héritier bénéficiaire*, art. 177; of an executor, art. 913 *et seq.*; of a husband for his wife's goods, art. 1425; of an agent, art. 1713; of partners, art. 1898. They have not been referred to and they have not found any passage in the Civil Code where these words are used to denote generally a debtor or person under liability.

For creditors and debtors the words used are "*créanciers*" and "*débiteurs*," see tit. III throughout, and particularly cap. 7. To express general liability the Code uses such verbs as "*tenir*," "*répondre*," "*charger*," and their inflexions or derivatives.

If there be any difference between the French and English versions, their Lordships think that in a matter which is evidently one of French law, the French version using a French technical term should be the leading one. There might be cases in which such a question would arise.

P. 169:—The appellants at the bar have pressed somewhat too absolutely the argument that a Procedure Code is not intended to enact substantial law, and that this part of the Procedure Code is only intended to give directions to the courts how to carry the rules of the Civil Code into effect. Some of the articles of the Procedure Code (e. g. art. 610) do create established rights not touched by the Civil Code. The two codes should be construed together in this part just as if the articles of the Procedure Code followed the corresponding articles of the Civil Code. See ABANDONMENT OF PROPERTY: *penalty for refusal*, SUBSTITUTION.

COLLISION

LIEN FOR DAMAGES BY

HARMER V. BELL. THE "BOLD BUCCLEUGH"²

30. Damages caused by collision confer a lien upon the ship in fault, and a maritime lien does not include or require possession, it attaches to the ship and travels with her into whosoever possession she may come, even in the hands of a *bona fide* purchaser without notice of the damage or the proceeding against the ship.

31. Where such lien exists, a proceeding *in rem* may be had and relates back to the period when it first attached.

DEAN V. RICHARDS. THE "EUROPA"³

32. A maritime lien for damage caused by a collision, follows the ship causing the damage, into whosoever

¹ Quebec, 1886 Feb. 18, L. R. XI Appeal Cases 157.

² Admiralty, 1851 Dec. 10, VII Moore 267.

³ Admiralty, 1863 July 17, II Moore N. S. 1.

LIEN FOR DAMAGES BY

hands she may go, and can be enforced at any time, provided there has been no improper delay, or laches, in enforcing such lien.

33. In this case a delay of three years to arrest the ship was held not an unreasonable delay, the owners of the damaged vessel having used reasonable diligence to discover her whereabouts.

34. Reasonable diligence means not doing everything possible, but doing that, which, under ordinary circumstances, and having regard to expense and difficulty, could be reasonably required.

ONUS PROBANDI. See EVIDENCE: *iisdem verbis*.
PARTIES IN FAULT.

PETLEY V. CATTO. THE "CHRISTIANA" ¹

35. In towing a vessel, a steam-tug came across a brig and was hailed by the pilot on board the vessel to go to the westward of the brig; it was some time after the order was given before it was obeyed, and there was a collision between the brig and the vessel.

36. Imperfect obedience is disobedience and it was unjustifiable under the circumstances, and the claims of the steam-tug for towage was dismissed.

VAUX V. SHEFFER. THE "IMMAGANDA SARA CLASINA" ²

37. The rule of the Admiralty Court where in collision cases both parties are mutually blameable and both guilty of negligence, is to apportion equally the damages between the respective owners of the vessels.

38. The owners of an English vessel brought an action for damages against a foreign vessel; the owners of this latter ship brought a cross action against the English vessel. Both actions were heard as one cause by consent. The Admiralty Court held, that the English vessel was the cause of the damage, and dismissed the foreign vessel from the action.

The Judicial Committee being of opinion that both vessels were in fault, decided that the damage would be equally divided between them, and remitted the cause to the court below, to ascertain the amount of damage, and to divide the same equally between the owners of the respective vessels.

VALENTINE V. CLEUGH ³

39. The regulations respecting the exhibiting of lights by vessels, and other provisions guarding against accidents

¹ Admiralty, 1848 July 5, VI Moore 321.

² Admiralty, 1852 Feb. 19, VIII Moore 75.

³ Admiralty, 1854 July 18, VIII Moore 167.

PARTIES IN FAULT.

from collision, made by the Lords of the Admiralty pursuant to the powers vested in them by statute have the force of the Act of Parliament, and are to be strictly and literally complied with.

40. When a barque anchored with a light hoisted on the larboard mizzen rigging is run into by a steamer, the owner of the barque cannot recover against the steamer, the regulations not being literally complied with, as the light ought to have been exhibited at the mast-head.

MACKAY V. ROBERTS. THE "FORTUNE" ¹

41. A barque was solely to blame for causing a collision off the *Lizard*, for not giving way upon a dark night to a small schooner close hauled to the wind on the starboard tack under close reefed sails.

The barque was condemned under section 28 of the 14th and 15th Vict., ch. 79.

**THE NETHERLANDS STEAM BOAT COMPANY V. STYLES.
THE "BATAVIER" ²**

42. A large steamer in the charge of a licensed pilot, in proceeding up the pool at nearly high tide, and at a speed dangerous to small craft, caused such a swell that a barge laden with coals was sunk. The steamer was to blame, as the swell which sunk the barge was attributable to the speed at which she was doing.

LAWSON V. CARR. THE "JAMES" ³

43. A ship was going slowly, her head towards the north, and came across another one also going slowly with the tide to the south, when a collision took place between them, the first having neglected to put up her helm in time, and the other not throwing back her headyards to avoid the collision. The Admiralty court decreed the damages to be equally divided between them.

44. This decree was reversed by the Judicial Committee, on the ground that the rule of the Admiralty court, that in case of mutual blame the damage was to be divided, was superseded by Statute 17th and 18th Vict., ch. 109, sec. 298, and that the penalty of a party neglecting the rules enjoined by section 296 of that statute, was to prevent

¹ Admiralty, 1854 Dec. 4, IX Moore 357.

² Admiralty, 1854 July 14, IX Moore 285.

³ Admiralty, 1856 Feb. 9, X Moore 162.

PARTIES IN FAULT.

the owner of the one vessel recovering damages from the other vessel, although also in fault.

45. Held also, that the above sections 296 and 298 were not confined to vessels strictly proceeding on their several voyages, but were equally applicable to vessels lying to.

THOMPSON V. FROW. THE "DUMFRIES" ¹

46. A schooner with the wind free, sailing from the southwest, and steering with a barque on the starboard tack, closehauled, is bound by the general rule of the sea or navigation to give way, that is to go astern.

47. A schooner not complying with this rule came into collision with a barque which kept her course. In such circumstances, the barque was held to have acted rightly as it was to be presumed that the schooner would give way to her, and the schooner not having seen the barque till too late, and then ported her helm, which led to the collision, was alone to blame.

CHURCHWARD V. PALMER. THE "VIVID" ²

48. A vessel at anchor in *Dover Roads*, in a fair way about a mile from the shore, opposite the harbour, waiting for the ebb tide, on a dark night, where vessels were accustomed to anchor, having a bright light burning, which was placed on a spar under the boom of the foresail, about four feet on the starboard side of the mast, and about twenty feet above the bulmarks, was run down by a steamer.

It was proved that there was a light exhibited on board the vessel, which could be seen as if it had been hoisted at the mast-head and that it would have been seen by the steamer if a proper look out had been kept.

The Judicial Committee held that the statute 17th and 18th Vict., ch. 104, sect. 298 did not apply, and the owners of the vessel had the right to recover from the steamer the loss they sustained.

MORGAN V. SIM. THE "LONDON" ³

49. The fact of its being a clear bright moonlight night, does not relieve a sailing vessel hove-to, from compliance with the Admiralty regulations, made in pursuance of the Statute 14th and 15th Vict., ch. 79, sect. 295, for exhibiting a light.

50. The omission to show a light being the cause of the collision, as it was probable that if a light had been shown

¹ Admiralty, 1856 July 11, X Moore 461.

² Admiralty, 1856 May 4, X Moore 472.

³ Admiralty, 1857 Dec. 15, XI Moore 307.

PARTIES IN FAULT.

the collision would not have occurred, and there being no default of watchfulness by the steamer, the owners of the sailing vessel were held concluded by section 298 of Statute 17th and 18th Vict., ch. 104, from recovering damage against the steamer.

ZUCASTI V. LAMER. THE "NORTH AMERICAN" ¹

51. A vessel on her port tack is bound to give way to a vessel on her starboard tack, and, if there is any danger of collision, to port her helm and go to leeward of the other vessel, which is to keep her course.

STEVENS V. GOURLEY. THE "CLEADON" ²

52. A vessel in tow of a tug, and the tug towing, is to be considered as one vessel, for the conduct of which the vessel towed is responsible.

53. The duty of a steam tug with a vessel in tow at night, is to avoid other vessels. A foreign vessel meeting another vessel is not governed by the Admiralty regulations but by the rule of the sea.

54. But a British ship in tow of a steam tug, meeting a foreign ship at night, is governed by the Admiralty regulations.

55. When a foreign vessel, close hauled on the starboard tack, approaches another vessel at night, she is bound to keep her course.

LORD CHELMSFORD, p. 97:—The "*A. H. Stevens*," being a foreign vessel, was not bound by our regulations, but was governed by the rule of the sea, which required her, being close-hauled on the larboard tack, if she was meeting another vessel, to keep her course. The "*Cleadon*" being in tow of the tug, it is admitted that she and the tug must be considered to be one ship, the motive power being in the tug and the governing power in the "*Cleadon*," the ship that was being towed. Under these circumstances, her rule of conduct would be our regulations, because she would not be aware whether the vessel she was meeting was a foreign or a British ship; at all events, as she was a British ship, of course she must be governed by the rules that apply to British ships. As she was a steamer it was her duty to get out of the way of another ship that she was meeting, and this more especially became incumbent upon her from the situation in which she was placed, because it appears that there is nothing which can indicate to any other vessel that a vessel is being towed, and, of course, under such circumstances, the combined vessels being a long body, and a vessel meeting them taking for granted, by seeing

¹ Admiralty, 1858 Dec. 4, XII Moore 331.

² Admiralty, 1860 Dec. 2, XIV Moore 92.

PARTIES IN FAULT.

the lights, that they are independent vessels, would be more careful, under such circumstances, to give a wide berth to any vessel that they are meeting.

BOLD V. HENRY ET AL. THE "DESPATCH" ¹

56. Where a vessel at anchor is not in the safest berth, so far as her own safety is concerned, but is safe so far as other vessels are concerned, this fact alone will not be viewed as contributory negligence, in case of another vessel running against her.

MADDOX V. FISHER. "THE INDEPENDENCE" ²

57. The 296th section of the Merchant Shipping Act, 17th and 18th Vict., c. 104, provides that whenever any ship, whether a steamer or a sailing ship, proceeding in one direction, meets another ship, whether a steamer or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they could pass so near as to involve any risk of a collision, the helms of both ships shall be put to port, so as to pass on the port side of each other. The Judicial Committee held that this section applies only to a case when vessels meet in opposite directions, end on, or nearly so; when the observance of the rule to port would make the vessels diverge in different directions, so as to pass port side to port side. But, that a steam tug with a vessel in tow is not a free steamer, and bound, under all circumstances, to give way to a sailing vessel close-hauled.

LORD KINGSDOWN, p. 115:—A steamer unincumbered is nearly independent of the wind. She can turn out of her course and turn into it again, with little difficulty or inconvenience. She can slacken or increase her speed, stop or reverse her engines, and can move in one direction or the other with the utmost facility. She is, therefore, with reason, considered bound to give way to a sailing vessel close-hauled, which is less subject to control and less manageable.

But a steamer with a ship in tow is in a very different position. She is not in anything like the same degree mistress of her motions; she is under the control of, and has to consider the ship to which she is attached, and of which, as their Lordships observed in the case of the "*Cleadow*" (see above), she may for many purposes be considered as a part, the motive power being in the steamer, and the governing power in the ship towed. She cannot by stopping or reversing her engines, at once stop or back the ship which is following her. By slipping aside out of the way of an approaching vessel, she cannot at once and with the same rapidity, draw out of the way the ship to which she is attached, it may be by a hawser of con-

¹ Admiralty, 1860 July 11, III Law Times N. S. 220

² Admiralty, 1861 Feb. 19, XIV Moore 103.

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siderable length, in this case of about fifty fathoms; and the very movement which sends the tug out of danger may bring the ship to which she is attached into it. Even if the danger of collision be avoided, it may be much less inconvenient for a ship close-hauled to change her course, than for a tug with a ship attached to her to do so.

BLAND V. RO-S. THE "JULIA" ¹

58. The master and crew of a vessel in tow are bound by law to obey the orders of the pilot. If by their act of disobedience, the steam-tug towing the vessel comes into collision and receives damage, the owner of the vessel is responsible.

LORD KINGSDOWN, p. 230 :—When the contract was made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each; and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken.

If, in the course of the performance of this contract, any inevitable accident happened to the one without any default on the part of the other, no cause of action could arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not by any misconduct or unskilfulness on her part contributed to the accident.

These are the plain rules of law by which their Lordships think that the case is to be governed.

THE NORTH GERMAN LLOYD STEAMSHIP COMPANY V. ELDER. THE "SCHWALBE" ²

59. A foreign steamer met at night, in the river Thames, two brigs advancing in parallel course from fifty to sixty fathoms apart from each other, and, instead of porting her helm, attempted to pass between them, and thereby caused a collision, by which one of the brigs was lost; the steamer was blamed and condemned.

MADDOX V. FISHER. "THE INDEPENDENCE" ³

60. In a case of collision between two ships, the rule is that where both vessels are to blame for causing the collision, the damages are to be divided.

LORD KINGSDOWN, p. 118 :—We are not, however, prepared to adopt that conclusion. That one vessel did wrong by no means

¹ Admiralty, 1860 Dec. 13, XIV Moore 210.

² Admiralty, 1860 Dec. 14, XIV Moore 241.

³ Admiralty, 1861 Feb. 19, XIV Moore 103.

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proves that the other did right. We think that both vessels were bound to take such measures as, when danger was seen to be imminent, would be calculated to avoid it.

See also: *THE HAMBURG AMERICAN STEAM NAVIGATION CO. V. THE NORTH OF SCOTLAND BANKING CO.* The "Eclipse" and the "Saxonia." 1861 Dec. 10, XV Moore 262.

BIRBY V. BOISSEVAIN. THE "EGYPTIAN" ¹

61. The proximate cause of a collision was the breaking of a steamer's port cable while mooring. The steamer was blamed, *first*, for having placed herself at single anchor in such a position that the happening of the slightest accident which might interrupt or embarrass the manœuvres the master was engaged in, would render a collision possible; and *secondly*, because if she had not delayed taking measures for mooring till so late at night, the collision would not have been inevitable.

GRINDLEY V. STEVENS. THE "FALKLAND" AND THE "NAVIGATOR" ²

62. When a vessel is sailing upon a wind and passes from one tack to another, the usual and ordinary mode of effecting this change is by tacking and not by wearing, as vessels which are navigating near to the one which is changing her tack naturally expect that the ordinary method of going about will be pursued, the unusual, and, therefore, unexpected operation of wearing ought not to be resorted to, unless for some good reason, nor without sufficient sea room for the purpose.

CAIL V. PAPAYANNI. THE "AMALIA" ³

63. In a case of collision, in the Mediterranean sea, beyond British jurisdiction, between an English and Belgian vessel, whereby the latter with her cargo was sunk, it was held that the 54th section of the 25th and 26th Vict., c. 63, with respect to limited liability applied equally to British and foreign vessels.

64. Owners of a vessel and cargo preferring their claim in the court of Admiralty to limited liability, in the first instance, do not necessarily thereby acknowledge that their vessel was to blame.

DRYDEN V. ALLIX. THE "MODERATION" ⁴

65. Departure from the rule provided by the 296th section of the Merchant Shipping Act, 17th and 18th Vict., c. 104,

¹ Admiralty, 1863 March 3, I Moore N. S. 373.

² Admiralty, 1863 July 31, I Moore N. S. 383.

³ Admiralty, 1863 July 21, I Moore N. S. 471.

⁴ Admiralty, 1863 Dec. 10, I Moore N. S. 528.

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for ships meeting each other to port their helms, may be allowed, if the circumstances of the case be such as to render such departure necessary to avoid immediate danger. It was so held in this cause, although such circumstances were not specifically pleaded, but were to be inferred from the pleadings and the evidence.

TROSTER V. BREWER. THE "CITY OF CARLISLE" ¹

66. The Admiralty regulations of 1858 provide: "that all sea-going sailing vessels when under way or being towed, shall, between sunset and sunrise, exhibit a green light on the starboard side, and a red light on the port side of the vessel"; and "that the coloured lights shall be fixed, wherever it is practicable so to exhibit them." In a case where the lights were placed on board, though only six feet above deck, it was held that having regard to the size of the vessel, the lights were fairly visible, and sufficiently complied with the regulations which did not require the lights to be placed on any particular part of the ship so long as they are fairly visible.

THE IMPERIAL ROYAL PRIVILEGED DANUBIAN STEAM NAVIGATION COMPANY V. THE GREEK AND ORIENTAL STEAM NAVIGATION COMPANY. THE "SMYRNA" ²

67. The rule of navigation, prudence and usage prescribe that an ascending vessel in a current ought to place herself out of the strength of the current, in order to allow full swing to the descending vessel, as the latter is necessarily hurried along by its force.

DEAN V. MARK. THE "CONSTITUTION" ³

68. According to the law and rules of England made in pursuance of "The Merchant Shipping Act, 1862 (25th and 26th Vict., ch. 63, sec. 25), the vessel on the port side was bound to get out of the way of the vessel on the starboard side, unless she had the wind free.

THE GREAT SHIP COMPANY V. SHAYLES. THE "GREAT EASTERN" ⁴

69. According to the rules of navigation, it is the duty of a steamer meeting a sailing vessel to reverse her engines and slacken her speed in sufficient time, according to the state of the weather, so as to avoid a collision.

¹ Admiralty, 1864 June 28, II Moore N. S. 366.

² Consular Court at Constantinople, 1864 June 24, II Moore N. S. 448.

³ Admiralty, 1864 July 15, II Moore 453.

⁴ Admiralty, 1864 July 13, III Moore N. S. 31.

PARTIES IN FAULT.**ANDERSON V. HOEN. THE "FLYING FISH" ¹**

70. A collision had taken place, and the injured vessel accordingly ran ashore. Though assistance was repeatedly offered, and the master was informed that she could be got off, he made no effort to save the vessel, refusing all assistance, and the vessel stranded and broke up: held, that as the vessel was not in such a state that all attempts to save her were hopeless, the master displayed such a want of nautical skill and neglect of duty that she could only recover for the damage directly occasioned by the collision, and not for that which subsequently occurred after the refusal of the assistance offered.

THE "ARAXES" AND THE "BLACK PRINCE" ²

71. The 296th section of the Merchant Shipping Act enacts, that when one ship meets another proceeding in another direction, so that if both were to continue their respective courses they would involve the risk of collision, the helms of both ship shall be put to port. A vessel obeying the above rule of the statute has a right to trust that the vessel she meets, if a British vessel, will obey it too. Hence, when a steamer, a mile and a half off, starboarded her helm instead of porting, she was *prima facie* in the wrong, though at that time if both had starboarded, the risk of collision would have been equally avoided.

THE "UNITED STATES" ³

72. A tug steamer, while being launched in the river, ran stern foremost into the starboard side of another steamer, then passing down the river, and negligently being at that place. Notwithstanding the negligence of this latter steamer, the tug might, by ordinary care, such as giving a signal before launching, have avoided the consequences of such negligence, and therefore, both being to blame, the tug was condemned to only half of the damage.

THE "ULSTER" ⁴

73. When two vessels, one going down the river, the other crossing it, sighted each other half a mile off, and the latter one having intended to turn her head down the river, was baffled by the flood-tide, but neglected thereupon to run up her outer jib so as to aid the operation; it was held that the

¹ Admiralty, 1865 Feb. 8, III Moore N. S. 77.

² Admiralty, 1861 August 3, V Law Times N. S. 39.

³ Admiralty, 1865 Feb. 9, XIII Law Times N. S. 33.

⁴ Admiralty, 1862 July 16, VI Law Times N. S. 736.

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former acted rightly in not altering the course she had properly taken, having a right to assume that the other ship would have taken all proper means to turn in the right direction.

THE "MALVINA" ¹

74. A steamer going down a river, having disobeyed without cause the direction of the Merchant Shipping Act, by keeping to starboard side of the channel, and the pilot as well as those on board being remiss in keeping a lookout, was held liable for damage to a barge sunk in a collision.

THE "AGRA" AND "ELIZABETH JENKINS" ²

75. The Judicial Committee reversed the judgment of the Admiralty Court in this case on the ground that both vessels were to blame, the damages were directed to be equally divided; each party to bear his own costs, both on appeal and in the court below.

THE "VELARQUEZ" ³

76. A steamer was sighted by a sailing vessel at a sufficient distance to have avoided a collision, the steamer taking no steps until the vessels were very near each other, when she starboarded her helm, and the sailing vessel ported her helm to avoid a collision, which, nevertheless, took place.

It was held that the steamer was alone to blame, as it was the duty of a steamer to keep out of the way of the sailing vessel, provided she could do it, either by starboarding or porting her helm, and that, on the other hand, it was the duty of the sailing vessel to keep her course, and that she could only be excused from deviating from it by showing that it was necessary to do so in order to avoid immediate danger.

INMAN V. BECK. THE "CITY OF ANTWERP" AND THE "FRIEDRICH" ⁴

77. The Court of Admiralty in this case held both vessels ⁵ to blame, and decreed the damages sustained to be equally divided between them. Such decree was reversed on appeal, as the case of the sailing vessel setting forth the alleged negligence on the part of the steamer had not been proved; and as, moreover, the sailing vessel not having

¹ Admiralty, 1863 April 13, VIII Law Times N. S. 403.

² Admiralty, 1867 July 17, IV Moore N. S. 435.

³ Admiralty, 1867 July 4, IV Moore N. S. 426.

⁴ Admiralty, 1868 Feb. 7, V Moore N. S. 33.

⁵ A sailing vessel and a steamer.

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appealed from the decree which declared she was in the wrong, such decree operated as *res judicata* that the allegations made in her suit were not substantiated.

LORD WESTBURY, p. 40:—It is undoubtedly true, in cases of collision between a sailing ship and a steamer, that, although the sailing ship may be found to have been guilty of misconduct, or not to have observed the sailing Regulations, yet the steamer will be held culpable, if it appears that it was in her power to have avoided the collision. It cannot be too much insisted on that it is the duty of a steamer, where there is risk of collision, whatever may be the conduct of the sailing vessel, to do everything in her power that can be done, consistently with her own safety, in order to avoid collision. But, according to the settled rules for the administration of justice, the party against whom judgment is given is entitled to know from the complaint of his adversary what is the default or misconduct imputed to him, that he may have an opportunity of meeting the case by his defence, and also by his evidence. And it is difficult to suppose a greater case of hardship than that a defendant, after having met and disproved the case made by the plaintiff, should yet have judgment pronounced against him upon some ground of complaint which was neither pleaded by his adversary, nor related in argument during the discussion of the cause and not even disclosed in the judgment of the Court.

P. 45.—When a steamer is condemned for having omitted to do something which she ought to have done, it seems just to require clear proof of three things: *First*, that the thing omitted to be done was clearly within the power of the steamer to do; *secondly*, that if done, it would, in all probability, have prevented collision; and *thirdly*, that it was an act which would have occurred to any officer of competent skill and experience in command of the steamer.

THE "PENNSYLVANIA" ¹

78. No rule can be made as to the rate of speed, it is left to be disposed of according to circumstances, but in passing through a place where there must frequently be a great number of vessels congregated, seven knots an hour is too great a speed for a steamer to proceed at.

THE "FENHAM" ²

79. In this case of collision between a steamship and a sailing vessel, occasioned by the fault of the steamship, it was proved, that the sailing vessel had failed to comply with the Admiralty regulations regarding lights, having either shown no lights, as she was bound, or if she had any lights, the lights could not be seen till the collision was too imminent for prevention.

¹ Admiralty, 1870 June 20, XXIII Law Times N. S. 55.

² Admiralty, 1870 June 21, VI Moore N. S. 501.

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The Judicial Committee was of opinion that the collision might have been avoided if the sailing vessel had obeyed the Admiralty regulations, and that though the omission to exhibit proper lights might be immaterial when it is clearly shown that the absence of such lights was not the cause of the collision, and did not conduce to it, yet that where it is proved that a vessel has not shown proper lights, the *onus* lies on such vessel to show, that the non-compliance with the regulation was not the cause of the collision, which the sailing vessel failed to do; the general rule being, that a vessel must not only obey the Admiralty regulations as regards lights, but must obey them in time to prevent an impending collision.

THE "ERK" AND THE "NIORD" ¹

80. Collision between two steamships while rounding a point on the river *Thames*. The "*Niord*" coming up and seeing the "*Erk*" rounding the point, having put her helm hard a-port, in order to cross the river, the "*Erk*" stopped, and reversed her engines, and put her helm a starboard, the result causing a collision; the "*Erk*" running almost at right angles into the "*Niord*," nearly at her midships, cutting clear into her boiler, and compelling her, in order to avoid sinking in deep water, to run ashore.

The "*Erk*" was to blame. The principles laid down in the "*Julia*" approved and acted upon.

THE "MAGNA CHARTA" ²

81. The speed of a vessel must be governed according to the circumstances. Thus, from four to five knots an hour for a steamer in a fog and with the wind strongly blowing, on the *Baltic*, was considered excessive, and, for this and a want of sufficient look out, the steamer was held to blame in a case of collision.

BEAL V. MARCHAIS, THE "BOURGAINVILLE" AND "JAMES C. STEVENSON" ³

82. A steamship seeing a sailing vessel at a distance of two or three miles ought not, even if the lights of the sailing vessel are not visible, to take a course which will carry her across the bows of the sailing vessel.

83. When a steamship is approaching a sailing ship, and does not know what course the other ship is pursuing, it is

¹ Admiralty, 1879 Nov. 28, VIII Moore N. S. 276.

² Admiralty, 1871 Nov. 15, XXV Law Times N. S. 512.

³ Admiralty, 1873 April 24, L. R. V. P. C. 316.

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her duty (whether the lights of the other vessel are visible or not) to take no decisive movement until she can ascertain it.

84. The law does not appoint any particular place at which the lights should be fixed, but they ought to be placed so as to be properly visible.

85. A manœuvre made too late to affect the collision, does not make the ship liable as having contributed to the collision, even if the manœuvre was erroneous.

MALCOMSON V. THE GENERAL STEAM NAVIGATION CO.
THE "RANGER" AND THE "COLOGNE" ¹

86. In going down the river *Thames*, steam vessels generally keep on the north side. Therefore, a vessel going up, under a port helm, seeing the red light of another vessel on her way down, over her starboard side, is not justified in supposing that the vessel coming down will pass her on her port side, and acting on this belief, if a collision occurs, she will be held alone to blame.

THE "WARPESIA" ²

87. To sustain a plea of inevitable accident it must be established that the party charged with the damage could not possibly prevent the collision by the exercise of ordinary care, caution, and maritime skill.

SIR JAMES COLVILLE, p. 478: — In the case of the *Bolina* ³, Dr. Lushington says: "With regard to inevitable accident, the *onus* lies on those who bring a complaint against a vessel, and who seek to be indemnified, on them is the *onus* of proving that the blame does attach upon the vessel proceeded against; the *onus* of proving inevitable accident does not necessarily attach to that vessel; it is only necessary when you show a *prima facie* case of negligence and want of due seamanship."

Again, in the case of the *Virgil* ⁴, the same learned judge gives this definition of inevitable accident: "In my apprehension, an inevitable accident in point of law is this, viz., that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. If a vessel charged with having occasioned a collision should be sailing at the rate of eight or nine miles an hour, when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred; if he could have used measures of precaution, that would have rendered the accident less probable."

¹ Admiralty, 1872 Dec. 5, L. R. IV P. C. 519.

² Admiralty, 1872 Feb. 15, VII. Moore N. S. 468.

³ 3 Notes of Cases, 210.

⁴ 2 W. Rob. 205.

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Here we have to satisfy ourselves that something was done, or omitted to be done, which a person exercising ordinary care, caution, and maritime skill, in the circumstances, either would not have done or would not have left undone, as the case may be.

SMITH V. ST. LAWRENCE TOW-BOAT COMPANY¹

88. Where a vessel in tow during a thick fog, knowing that it was dangerous to proceed, did not order the tug to stop and the vessel in consequence ran aground, both were held to have contributed to the accident.

SIR BARNES PEACOCK, p. 313:— It appears to be clear that when no directions are given by the vessel in tow, the rule in the case of tug steamers is, that the tug shall direct the course. The tug is the moving power, but it is under the control of the master or pilot on board the ship in tow.

The rule was clearly laid down by Lord Kingsdown in the case of the *Julia*. Speaking of the duties of a tug steamer, he says: "a tug is to use proper skill and diligence, and is liable for any damage by her wrongful act. When the contract to tow was made, the law implied an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board each; that neither vessel, by neglect or misconduct, would create unnecessary risk to the other or increase any risk which might be incidental to the service undertaken. If, in the course of the performance of the contract, any inevitable accident happened to the one without default on the part of the other, no cause of action would arise. If, on the other hand, the wrongful act of either occasioned damage to the other, such wrongful act would create a responsibility in the party committing it, if the sufferer had not by any misconduct or unskilfulness on his part contributed to the accident.

THE "FRANKLAND" AND THE "RESTREL"²

89. Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall, in a fog, go at a moderate speed.

THE "AIMO" AND THE "AMELIA"³

90. A vessel meeting another which is bound to keep out of her way, but which cannot do it on account of her disabled condition, and ignoring the position of this latter, continues her course. She is not liable for the collision which ensues, as it is a case of inevitable accident.

¹ Quebec, 1873 March 24, L. R. V. P. C. 309.

² Admiralty, 1873 Dec. 6, XXVII Law Times N. S. 633.

³ Admiralty, 1873 May 20, Law Times N. S. 118.

PARTIES IN FAULT.THE "C. M. PALMER" AND THE "LARNAX" ¹

91. A vessel is bound to keep a light constantly visible; the taking down of the lamp just for the time necessary to trim it is no excuse, if a collision takes place at that moment and on account of the absence of light.

THE "RONA" AND THE "AVA" ²

92. A ship is to blame if she maintains a speed of nine and a half to ten knots an hour, when she is aware that her own lights and those of any approaching vessel are obscured by the smoke from her own funnel.

THE "NOR" ³

93. A vessel is not to be blamed to the extent of being held liable, when at the last moment before the collision she has executed a wrong manœuvre.

94. Rule 14th of the admiralty provides that "if two vessels under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other." The Judicial Committee held that according to the true construction of this rule, the vessel in order to keep out of the way is not necessarily obliged to port in all cases; it may be properly done, according to circumstances, by stopping, by going ahead, by starboarding, by porting or by going astern.

THE "KJOBENHAON" ⁴

95. In an action of damages for collision, the plea of the defendant that she could not comply with the sailing regulations and ordinary rules of the sea, because she was disabled in an anterior collision, is bad if she was in fault in the prior collision.

UNION STEAMSHIP CO. V. OWNERS OF THE "ARACON"
"AMERICAN" AND "SYRIA" ⁵

96. A steamship found at a foreign port a screw steamer totally disabled in her machinery, and belonging to the same owner. The captain of the steamship in order to protect his employers' interest and to earn at the same time salvage from the owners of the screw steamer, took this latter in

¹ Admiralty, 1873 May 20, XXIX Law Times N. S. 120.

² V. A. Hong Kong, 1873 Dec. 6, XXIX Law Times N. S. 781.

³ V. A. Gibraltar, 1874 March 20, XXX Law Times N. S. 577.

⁴ Admiralty, 1874 Feb. 17, XXX Law Times N. S. 136.

⁵ Admiralty, 1874 July 24, L. R. VI, P. C. 127.

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tow, but whilst doing so came into collision with a sailing ship close hauled on the starboard tack, and sank her. The steamship, under the circumstances proved, was found to blame for the collision, but as the governing as well as the motive power were with the steamship, the screw steamer was not held liable for any damage, both being considered as one vessel.

SIR ROBERT P. COLLIER, p. 132: — The question remains whether the *Syria*, though free from blame in fact, must nevertheless be held to blame by intendment of law. The decision of the learned judge upon this point appears to be based upon the principle shortly stated by Lord Kingsdown, in the passage which has been before cited as that on which the *Cleadon*¹, was decided, viz., that the motive power was in the tug, the governing power in the ship towed. The judge of the Admiralty court applying this principle to the present case, held that the *American* and the *Syria* constituted one vessel in intendment of law. This is no doubt an accurate representation of the relations usually subsisting in this country between the tug and the tow. The tug is in the service of the tow, the tow is answerable for the negligence of her servant, and is for some purposes identified with her. Some American cases have been cited which, though differently decided, illustrate this principle.

It appears that, in the large American rivers and lakes it is usual for a tug, which is spoken of as a public vessel, to take a number of small vessels in tow; some alongside of her, some astern. She assigns to each of these vessels its place, and they are under her direction. Under these circumstances, the American courts have held that a vessel towed is not liable for the negligence of the tug, because the "governing power," is in the tug, not in her. The master of the *American* appears to have undertaken to tow the *Syria* under circumstances quite exceptional. Their Lordships collect that he determined to take home the *Syria*, partly because he thought it his duty to his employers who owned both vessels, partly with a view to obtain salvage from the owners of the *Syria's* cargo (which he succeeded in doing). This is no evidence of his having been hired by the *Syria*, as having acted in any way under the captain of the *Syria's* control. On the contrary, it would appear that the "governing power" was wholly with the *American*. Under these circumstances, their Lordships are of opinion that the principle on which the *Cleadon* was decided does not apply to this case, that the *Syria* cannot be deemed in intendment of law one vessel with the *American*, or liable for the negligence. Nor do they think that the fact of the *American* and *Syria* belonging to the same owners affects the question whether or not the *Syria* was to blame.

THE "ANGLO INDIAN"²

97. It is the duty of an overtaking vessel to keep out of the way of the vessel ahead of her. However, if this latter

¹ 14 Moore P. C. 97.

² Admiralty, 1875 April 29, XXXIII Law Times N. S. 233.

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sees that the overtaking vessel, either by negligence or for other reasons, does not see her and is likely to come into collision with her, it is her duty to give some warning to the approaching vessel, not necessarily by exhibiting a light, but by some signal, such as the firing of a gun, or otherwise, which would indicate her whereabouts to the other ship and call her attention to the danger of a collision.

THE "EARL OF SPENCER" ¹

98. A steamer entering during a dark and stormy night into a harbour where a great number of vessels were anchoring near the path which she took, at a speed of eleven knots an hour, is liable if she come into collision with another vessel, as this speed, in such circumstances, is excessive and reprehensible.

THE "NORMA" ²

99. It is against the rule for a sailing vessel meeting a steamer to port her helm on approaching the steamer; she is bound to keep her course.

THE "BELLEROPHON" ³

100. Where there is in a ship or elsewhere, a constant instrument of danger, those who have the control and the possession of it are bound to take all reasonable precautions that it shall not cause damage to others.

101. This obligation to give a notice as a warning of danger must arise from the existence of some reasonable probability of danger to the party to whom that notice is to be given, and an opportunity of giving it so as to enable such party to avoid the danger.

102. This rule does not apply where there is no reasonable ground for anticipating any danger. *Vaughan v. The Taff Vale Railway Co.* 29 L. J. 247, Ex.

THE "FANNY M. CARVILL" ⁴

103. Where in a ship the screw projected considerably more than one foot from the position of the light in a direction parallel to the keel, and her light was not visible two points over her port bow, it was held that, although this was an infringement of the regulations within the meaning of the Merchant Shipping Act (article 3 sailing rules), and although under the 17th section of said Act, (36 and 37 Vict.,

¹ Admiralty, 1875 June 17, XXXIII Law Times N. S. 235.

² Admiralty, 1876 March 30, XXXV Law Times N. S. 419.

³ Admiralty, 1875 June 19, XXXIII Law Times N. S. 413.

⁴ Admiralty, 1875 June 9, XXXII Law Times N. S. 647.

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ch. 85, 1873) it is no more incumbent on a plaintiff to prove that an infringement of a regulation by the ship in fact contributed to the collision, yet to make the ship liable, in a case of collision, it must be established that the infringement charged is one having some possible connection with the collision.

SIR JAMES W. COLVILLE, p. 648:—These being the facts of the case, it follows that the *Fanny M. Carvill*, which failed to keep out of the way of the *Peru*, must be pronounced solely to blame for the collision, unless by force of the 17th section of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), as construed in the recent case of the *Hibernia*, the *Peru* is to be deemed to be also in fault; although the particular infringement of the sailing rules imputed to her neither did, nor could by any possibility have contributed to the accident. The words of the statute are: "If, in any case of collision, it is proved to the court before which the case is tried, that any of the regulations for preventing collisions contained in, or made under the Merchant Shipping Acts 1854 to 1873, have been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary." The alleged infringement is of that part of Article 3 of the sailing Rules which prescribes that "the green and red side lights shall be fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow." The screw of the *Peru* is shown to have been nearly a foot (about 11 inches) short of the prescribed length. It must be assumed that those under whose advice the rule was framed considered that a length of 3ft. was necessary in order to prevent the light from being seen, under any circumstances whatever, across the bow. And there is evidence in the cause, independent of that of the discredited witnesses, to show that, under some circumstances, the green light might be perceptible across the bow. Their Lordships, therefore, notwithstanding their conviction that the green light could not have been seen more than a very few degrees (if at all) across the bow of the *Peru*, will assume that there was an infringement of the regulation within the meaning of the statute. And it has certainly not been shown that the circumstances of the case made a departure from the regulation necessary. In construing the clause in question, it is to be observed that the Act of 1873 did not repeal, nor was it a substitute for, the Merchant Shipping Acts of 1854 and 1862. On the contrary, its 2nd section declares that it is to be construed as one with them. Now, the 298th section of the Act of 1854, and the 29th section of the Act of 1862, provides each that in certain cases of infringement of the sailing regulations those guilty of the infringement shall incur certain consequences. But each contains the qualification that the collision shall appear to the court to have been occasioned by the non-observance of the regulation infringed. When, therefore, in the 17th section of the Act of 1873, the legislature omitted this qualification, it must be presumed to

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have done so designedly, and, at all events to have intended that it should no longer be incumbent on the opposite party to prove that the non-observance of the regulations in fact contributed to the collision. Nor does it appear to their Lordships that the 17th section of the Act of 1873 can be taken merely to shift the burthen of proof by raising a presumption of culpability, to be rebutted by proof that the non-observance of the rule did not in fact contribute to the collision, because the preceding (the 16th) section clearly shows that where the Legislature intended only to raise a presumption capable of being rebutted by such proof it used apt words to express that intention. Their Lordships therefore conceive that, whatever be the true construction of the enactment in question that which would take the case out of its operation by mere proof that the infringement of the regulation did not, in point of fact, contribute to the collision, is inadmissible. They conceive that the Legislature intended at least to obviate the necessity for the determination of this question of fact (often a very nice one) upon conflicting evidence. There remain, however, two other possible constructions. The first is that, on proof of an infringement of any of the regulations for preventing collisions, there arises, subject only to the qualification contained in the final clause of the section, an absolute presumption of culpability against the vessel guilty of such infringement, to which the court is bound to give effect, whatever the nature of the infringement may be. The other is that the infringement must be one having some possible connection with the collision; or, in other words, that the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision. The former of these constructions, though possibly the more consistent with the literal meaning of the words of the section, seems to their Lordships to be the less reasonable of the two. It not only leads to the extravagant consequences pointed out by the learned judge of the Admiralty Court; it implies an intention which, without the plainest language, can hardly be imputed to the Legislature. For it is one thing to say that when the circumstances show that the infringement of the regulations might have contributed to the collision, the court shall conclusively infer that it did so. It is another, and very different thing to say, that the court shall draw the same inference, when the circumstances show that the infringement, from its nature, could not possibly have contributed to the collision. In the latter case the Legislature would entirely alter the nature of the shipowner's liability. As the law stood, he was civilly liable in damages for the consequences of his act or omission. The new law, so far as it enacts that the consequences which might have flowed from that act or omission, shall be presumed to have flowed from it, does not affect the nature of that civil liability. But on the supposed construction it would virtually substitute for a civil liability which the shipowner could not have incurred, a penalty for the infringement of the regulations irrespective of the nature or possible consequences of that infringement—a penalty, moreover, of uncertain application, since it is dependent on a collision, and varying in severity with the injury done by the collision. It would, in effect, make the vessel guilty

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of the infringement, a sort of outlaw of the seas, by depriving her of the right to recover, under any circumstances, more than half the damages to which, by the general law maritime, she might become entitled. Again, it can hardly be denied, though the words perhaps admit of such a contention, that the infringement proved must be one existing at the time of the collision. And if this be so, it seems but reasonable to infer that it must also be one that has some possible connection with the accident. Their Lordships are of opinion that the second construction, which is not absolutely inconsistent with the phraseology of the enactment, and is by far the more reasonable of the two, ought to be adopted. It gives effect to the statute by excluding proof that an infringement, which might have contributed to a collision, did not in fact do so; and by throwing on the party guilty of the infringement the burden of showing that it could not possibly have done so.

THE "HIBERNIA" ¹

104. The infringement of any of the admiralty regulations, whether it has been the cause of the collision or not, is sufficient to have the guilty vessel deemed in fault, unless it is proved that the circumstances made a departure from the regulation necessary.

THE "HENRY MORTON" ²

105. The proper course for an outward bound steamer leaving the Tyne dock is to straighten her course as soon as possible, so as to proceed down on the southern side of midchannel.

THE "LAKE ST-CLAIR" v. THE "UNDERWRITER" ³

106. According to the general rule of navigation, it is the duty of the port tacked ship to get out of the way of the starboard tacked ship, but, however, when the former ship is helpless and in an unmanageable condition, it is the duty of the latter to execute the necessary manœuvres to avoid the collision.

WILSON v. CANADA SHIPPING CO. ⁴

107. When a port tacked vessel has thrown herself into stays and become helpless, she ought nevertheless to execute any practicable manœuvre in order to get out of the way of a starboard tacked vessel.

108. A starboard tacked vessel when apprised of the helpless condition of a vessel which by the ordinary rule of

¹ Admiralty, 1875 Dec. 5, XXXI Law Times N. S. 805.

² Admiralty, 1875 Dec. 12, XXXI Law Times N. S. 859.

³ Admiralty, 1877 Feb. 13, XXXVI Law Times N. S. 155.

⁴ Admiralty, 1877 Feb. 14, L. R. II Appeal Cases 389.

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navigation ought to get out of her way, is bound to execute any practicable manœuvre which would tend to avoid a collision.

Both vessels were held to blame for the collision.

THE "WILLIAM FREDERICK" v. THE "BYFØGED CHRISTENSEN" ¹

109. Each vessel seems, up to the time when the collision became inevitable, to have kept its course, and to have acted as if it were the duty of the other vessel to keep out of the way. The question as to which of the vessels was right was decided by the real direction of the wind.

SIR JAMES W. COLVILLE, p. 672: — They conceive that to leave to masters of vessels a discretion as to obeying or departing from the sailing rules is dangerous to the public; and that to require them to exercise such discretion, except in a very clear case of necessity, is hard upon the masters themselves, inasmuch as the slightest departure from these rules is almost invariably relied upon as constituting a case of at least contributory negligence.

CHINA MERCHANTS STEAM NAVIGATION CO. v. BIGNOLD ²

110. Where a vessel did not steer her course to avoid collision, and the other exhibited no proper lights, both were found in fault, and the damage was divided.

EMERY v. CICHERO. THE "ARKLAW" ³

111. Where the lights of the complaining vessel were not properly burning, and were not visible on board the other vessel, in the absence of proof that this latter was also to blame, the suit must be dismissed.

SIR JAMES HANNEN, p. 139: — But the learned judge below says that this question of the lights is immaterial when it appears that this absence did not cause the collision. On this part of the case their Lordships are unable to concur with the judgment of the learned judge below. The principle in cases of this kind, where there has been a departure from an important rule of navigation, is this, that if the absence of due observance of the rule can by any possibility have contributed to the accident, then the party in default cannot be excused.

SCICLUMA v. STEVENSON. THE "RHONDDA" ⁴

112. When the captain or pilot discovers that there is a danger of collision, his duty is to stop and reverse the engine. And if the ship does not obey her helm, owing to the action of a current, he is not to blame.

¹ V. A. Gibraltar, 1879 June 19, L. R. IV Appeal Cases 1669.

² Admiralty, 1882 May 10, L. R. VII Appeal Cases 512.

³ Admiralty, 1883 Nov. 21, L. R. IX Appeal Cases 136.

⁴ V. A. Malta, 1883 June 5, L. R. VIII Appeal Cases 549.

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RUSSIAN SS. "YOVRI" v. BRITISH SS. "SPEARMAN" ¹

113. All vessels going down the Danube must keep to the right bank, and in coming up, to the left bank; it is a neglect of duty and negligence to come across to the other side. *Danube commission rules*, ch. II, rule 34.

THE "GLAMORGANSHIRE" ²

114. There is no presumption of culpability, in a case of collision, on the part of ships whose light was fixed in the rigging, as it is the common practice in American ships, even if the foresail or some portion of it could interfere so as to prevent the lamp shewing a uniform and unbroken light over an arc of the horizon of ten points of the compass, it being in evidence that the lamp gave a bright light which would be visible at a distance of three miles.

THE "CITY OF PEKING" v. THE COMPAGNIE DES MESSAGERIES MARITIMES ³

115. Where a vessel under steam runs down a ship at her moorings in broad daylight, that fact is by itself *prima facie* evidence of fault, although such steamer is well equipped, and both officers and men are shewn to have been at their posts on the outlook.

116. This collision under such circumstances was attributable to the effect of an exceptional current, known to be a possible though improbable contingency, but it was shewn that the port anchor of the steamer was not in readiness, and that the delay arose in dropping the starboard anchor; it was held that the steamer had neglected ordinary precautions and could not be absolved from blame.

OCEAN STEAMSHIP COMPANY v. APCAR & Co. ⁴

117. Where in a collision case it appeared that one vessel had been navigated with reckless negligence, and the other had committed a comparatively small error in not slackening speed in good time, but in not doing so had infringed a regulation for preventing collisions at sea, the latter vessel could not be absolved from the consequences prescribed by statute and was held liable.

See EVIDENCE: appreciation of, and: inevitable accident, MERCHANT SHIPPING: construction.

¹ New South Wales, 1885 Feb. 12, L. R. X Appeal Cases 279.

² China and Japan, 1888 March 22, L. R. XIII Appeal Cases 454.

³ Admiralty, 1888 Dec. 1, L. R. XIV Appeal Cases 40.

⁴ Admiralty, 1889 Nov. 30, L. R. XV Appeal Cases 37.

COMMISSION

ON ADVANCES.

POLLOCK ET AL. V. BRADBURY ¹

118. The respondent was a merchant who was in the habit of advancing supplies of goods, money, promissory notes or other commercial instruments to country customers. Accounts, returns and settlements were made from time to time at their convenience with produce from the upper country, transferred by vessels and barges. For the advances of cash and negotiable securities, the respondent charged a commission of five per cent and interest from the time the different items of their accounts became due, under special agreement to that effect.

The Privy Council held that a commission of five per cent on all advances besides interests, under the circumstances, was not an usurious one or a cover for an usurious transaction, but a customary allowance for the trouble and inconvenience of transacting the business.²

COMMUNITY

See DOMICIL, MARRIAGE, INTERNATIONAL LAW.

COLLOCATION

See INSOLVENCY.

COMPANY, (JOINT STOCK)

See CORPORATION.

COMPENSATION

See ALIMENTARY ALLOWANCE: *cannot be compensated*, INSOLVENCY: *eodem verbo*, SURETYSHIP: *eodem verbo*.

WHEN IT TAKES PLACE.

RYLAND V. DELISLE ³

119. Compensation between two debts takes place by the sole operation of law between debts only which are at the same time equally due and exigible, and having each for object a sum of money or a certain quantity of indeterminate things of the same kind and quality. If one of the two claims cannot be collected by the creditor without a certain formality, so long as it has not being fulfilled, the debtor cannot oppose the claim in compensation to a third party exercising by law the right of the creditor who is his own debtor.

¹ Lower Canada, 1854 Feb. 4, VIII Moore 227.

² The general laws of usury were abolished by 22 Vict. ch. 85, sect. 1859.

³ Lower Canada, 1869 July 6, VI Moore N. S. 225.

WHEN IT TAKES PLACE.

120. This was an action taken by a creditor of an insolvent Railway company against one of its shareholders. The Canadian law on Railways, to wit, chapter 66 of the Consolidated Statutes provides that "each shareholder shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock held by him, for the debts and liabilities thereof, and until the whole amount of his stock shall have been paid up, but shall not be liable to an action therefor before an execution against the company shall have been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against such shareholder." The action claimed the balance due by the defendant on his shares. The defendant pleaded compensation under articles 1187 and 1188 of Civil Code, the company being indebted to him for salary as President to an amount exceeding the sum due on the unpaid stock.

The Court of Queen's Bench maintained the plea of compensation, but this decision was reversed by the Judicial Committee on the ground that, compensation did not take place *de plano* between the debt due by the shareholder and the claim of this latter as no calls in respect of the unpaid stock held by defendant had been made as provided by the Railway Act, and so compensation had not taken place between the said parties, and the company had no claim against the defendant.

THE LORD JUSTICE GIFFARD, p. 234: — Now, the action in which that judgment was given was an action brought by a creditor of the company against a shareholder as a defendant, and in that action it was proved that there had been a return by the sheriff of *nulla bona* with reference to the company and the action, defended in the first place on the section of the General Railways Act, which is under the head of "Shareholders," and is the first paragraph of section 19. By that section it is enacted that "Each shareholder shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock held by him for the debts and liabilities thereof, and until the whole amount of his stock shall have been paid up, but shall not be liable to an action therefor before an execution against the company shall have been returned unsatisfied, in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against such shareholder." Well, that being the case of the plaintiff, of course the case made by the defendant was that there was due to him from the company for salary as secretary a sum very far exceeding anything that he was or could be made liable to the company for in respect of calls; and we must presume that no calls beyond calls for a sum beyond £100 had been made, because if any such calls had been made, it was the

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business of the defendant both to allege that they had been made, and to prove that they had been made, and there is neither allegation nor proof that they had been made; and, moreover, the Courts below all seem to proceed on the assumption that they never had been made.

That being so, he alleged that these sums due to him in point of fact extinguished his liability to the company, and that inasmuch as the company never could have maintained proceedings against him in respect of any calls that they might make, the shareholders are in no better position than the company.

Their Lordships are of opinion that that is not the true position of the shareholder, and that in point of fact what the shareholder, in order to maintain his action, has to ascertain is this, and nothing else, namely, aye or no, has there or has there not been payment by the shareholder to the company of everything due from him to the company in respect of calls? It is not at all for their Lordships to decide on this present occasion what the effect would have been of the clause in the Code to which they have been referred, if calls had been actually made by the company antecedently to the time when the creditor brought the action against the shareholder. It may possibly be that if calls had been actually made by the company antecedently to the time when this creditor brought his action against the shareholder, then the debt would have been extinguished, and that then there would have been payment within the meaning of the first clause of the 19th section. But here there was nothing of the sort, and we must therefore turn to the clause in the code and see what it is which that clause provides.

First of all it is said in the 1187th clause: "When two persons are mutually debtor and creditor of each other, both debts are extinguished by compensation which takes place between them in the cases and manner hereinafter declared"; then the 1188th clause is: "Compensation takes place by the sole operation of law between debts which are equally liquidated and demandable, and have each for object a sum of money, or a certain quantity of indeterminate things of the same kind and quantity;" then what follows is not exactly the same translation as that which is given to us in the case. The translation which is given to us in the case is: "So soon as the debts exist simultaneously they are mutually extinguished, in so far as their mutual amounts correspond;" but it is enough for us to say that there could have been no compensation, as between the shareholder and the company at the time of the action being brought, because when we turn to the Railway Act, we see that before any action could have been maintained as against the shareholder there must have been calls made by the Directors against the shareholder, and thirty days must have elapsed antecedently to any action being brought by the company against the shareholder.

It is quite clear at the time when the creditor brought his action, this gentleman, if he had any claim at all, had a right to proceed against the company, and recover from the company the £2,000, or whatever sum was due to him as treasurer or secretary, and the company could never have set up, as against that action, any counter

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claim which they might have had in respect of his being a shareholder, because the company at that time had not made any call. So here their Lordships are of opinion the creditor is in a position different from that of the company, and that the creditor here had a right to recover from the shareholder, everything that was due from the shareholder to the company, which was not actually paid, discharged or extinguished, and that this clause in the Code has no operation whatever on such a state of circumstances as this—a state of circumstances in which, although there was a claim by the defendant against the company, there was no counter right on the part of the company, and no compensation as between him and them, and consequently no extinguishment of the debt.

CONFLICT OF LAW

See INTERNATIONAL LAW.

CONQUEST

See INTERNATIONAL LAW : *alteration of law in British colonies.*

CONSORTS

See MARRIAGE, SEPARATION.

CONTEMPT**DISCRETION OF COURTS.**

BEAUMONT V. BARRETT ¹

121. Commitment for contempt by a Court of Justice is a matter of discretion with which, as a general rule, no other court should interfere.

MR. BARON PARKE, p. 73 : — It is also established by all the cases on this subject, that if one court commit for a contempt, no other court can inquire into that contempt.

FINING, SUSPENDING AND STRIKING ATTORNEY OFF THE ROLL FOR CONTEMPT. See ATTORNEY : *iisdem verbis.*

PARTIES IN CONTEMPT. See PRACTICE : *iisdem verbis.*

POWER OF LEGISLATURES TO PUNISH FOR. See LEGISLATURE : *iisdem verbis.*

CONTRACT

BREACH OF See DAMAGES : *iisdem verbis.*

CONFUSION BY MARRIAGE. See ANNUITY : *iisdem verbis.*

COMMERCIAL CONTRACT.

McKAY V. RUTHERFORD ²

122. A contract between a contractor and a government commissioner, to supply stone for making a canal, is a com-

¹ Jamaica, 1836 June 17, I Moore 59.

² Lower Canada, 1848 Dec. 12, VI Moore 413.

COMMERCIAL CONTRACT.

mercial matter, and can be proved according to English law by parol evidence.

LORD CAMPBELL, p. 427: — Is or is not this a case concerning a commercial matter? It seems to us that the Legislature intended, that all matters there, which concerned the customs of the Canadians, though they are now subject to the rule of England, should remain untouched; and with respect to contracts to be entered into by Englishmen who were settled there, or between them and natives, or between natives amongst themselves, all such contracts should be enforced according to the rules and laws of *England*.

Now, this is a contract for the making of a canal, whereby a large capital is to be laid out, and a considerable risk is to be run, and we think that it is a matter within the meaning of this section concerning commerce, and that being so, we think, by this enactment, the contract is to be proved by the rules of evidence laid down by the English law.

We cannot for a moment listen to the distinction which was attempted at the bar, between proof of a contract, and the proof of the performance of a contract. It would be very strange if such a distinction had been made by the Legislature of Lower Canada, but it seems to us, it is not made, because it speaks of all facts concerning commercial matters, and the facts by which a contract is constituted, are facts concerning commercial matters, as much as the facts respecting the performance of the contract. 25 *Geo. III* ch. 2, sect. 10; *C. S. L. C.* ch. 82, sect. 17; *C. C. B. C.*, art. 1206.

CONSTRUCTION OF

CAIN V. TEARE ¹

123. Construction of the word "heir" in a deed.

LORD BROUGHAM, p. 258: — It is impossible to deny that the word heir in a deed, may be either a word of limitation, or of purchase; it is a flexible word, and even admitting that it is more properly a word of limitation than of purchase, yet being, as I have said, a flexible word, it is much more flexible when used in the singular than when used in the plural, to denote a class, as "heirs."

THE BANK OF AUSTRALASIA V. BREILLAT ²

124. An instrument may be partly valid and partly invalid. Thus, in an instrument containing distinct engagements, by which a party binds himself to do certain acts, some of which are legal, and some illegal at common law, the performance of those which are legal may be enforced, though the performance of those which are illegal cannot.

THE BANK OF BENGAL V. FAGAN ³

125. The words: "sell, endorse and assign" used conjunctively in a power of attorney may be used in the dis-

¹ Isle of Man, 1843 June 19, IV Moore 249.

² New South Wales, 1847 Dec. 14, VI Moore 152.

³ Bengal, 1849 July 7, VII Moore 73.

CONSTRUCTION OF

junctive; they mean a power to sell, a power to endorse, a power to assign. The adverse construction would lead to this, that these words, not only give no power to endorse, without selling, but also, that they give no power to sell without endorsing, and then the agent would be acting under a power whereby he would be entirely crippled. See also *The Bank of Bengal v. Macleod*, VII Moore 35.

TURNER V. BARCLAY ¹

126. In the Island of Jamaica, cattle and stock upon a plantation or farm are personal estate.

127. A mortgage given on real estate "with all and every the lands thereunto respectively belonging, and their respective appurtenances" does not include the cattle and stock thereon.

CHOTAYLOLL V. MANICK CHUND AND KAISREECHUND ²

128. Two parties made a bet in writing as to the average price to be obtained for opium "at the first *lelaum* or public sale of the *Patna*, of the 30th of November." The sale on that day was prevented by a combination of opium speculators interested in similar contracts. The sale was again advertised, and took place on the 6th of December following.

Held that the date mentioned in the contracts, the "30th of November" was only a description of the period, when the first public sale of opium usually took place and formed no part of the risk contemplated by the wagers, the parties not having made a specific day essential to their contract.

DINECH V. CORLETT ³

129. It was stipulated in a charter party that the ship should sail "with all convenient speed," but the parties had not expressly stated that unless the ship sailed on a specified day, the charter party was to be null. The charterer resided at the place where the ship was lying at anchor, and made no objection at the time to the daily postponement of the departure of the ship and, moreover, no evidence of any other loss than that occasioned by the falling of freights, was made. The Judicial Committee held that, under the circumstances, the position of the parties was not altered by such postponement, and an action, therefore, was maintainable against the charterer upon the charter party.

¹ Jamaica, 1854 July 1st, IX Moore 264.

² Calcutta, 1856 Feb. 2, X Moore 124.

³ Malta, 1858 June 22, XII Moore 200.

CONSTRUCTION OF

130. Held, also, that it is important not to give to mercantile instruments, such as a charter-party, an unnecessarily strict construction; but such a construction as, with reference to the context, and the object of the contract, would effectuate the obvious and expressed intention of the parties.

THE RIGHT HON SIR JOHN T. COLERIDGE, p. 226:— Under such circumstances, it was contended that had this been an English contract, it was clear that the mere failing to sail within a reasonable time, or with convenient speed, was no answer to an action on the contract, *Clipsham v. Vertue* (52. B. Rep. 265); and *Tarrabochia v. Hickie* (1 Hurlst and Nor. 183), with several other cases, were cited in support of this doctrine, and it was further contended, that this rule of our mercantile law was founded so manifestly on good sense and equity, effectuating so generally the probable intention of the parties, that, in the absence of any express authority to the contrary, it was to be presumed to be the law governing the mercantile contracts of *Malta*. Limiting ourselves to the facts of this case, and to the extent to which it is necessary to go for the present judgment, we agree to both parts of this argument; the parties have not expressly stated for themselves in the charter-party that, unless the vessel sailed by a specified day, the charter-party should be at an end; and courts ought to be slow to make such a stipulation for them. It is to be presumed that the respondent, residing at *Malta*, knew of the delay in the completion of the vessel, and of the time when it was ultimately in a condition to sail; if so, and if he had intended to insist that the charter-party was no longer binding, nothing would have been more easy or just than to give notice to the appellant that he so regarded it. The object of the charter-party is, indeed, frustrated, but not by any delay in the ship's sailing, such as the charterer had a right to complain of: that which defeated his speculation was the fall in the rate of freight; it was, therefore, for him to show that had the shipowner performed his contract in time, the ship would have arrived before the fall had occurred: this he has failed to do.

P. 228:— A contract that a thing shall be done on a day named is in itself certain and defined; it excludes all consideration of the influence of future circumstances; but a contract that it shall be done with all convenient speed necessarily admits a consideration of them all; and then what, under the circumstances, is "convenient speed" may plausibly enough be judged differently by different minds. It is, therefore, not unreasonable to hold, that in the former case the stipulation was intended to be a warranty, and yet to consider a failure in the latter as only entitling the party to a cross action, or allowance from the damages, whenever the consequence of the failure has only been partially injurious, and has left the main object of the contract still attainable.

131. The principles of assessment of damages or penalty for non-performance of a contract were considered by the Judicial Committee as follows:

CONSTRUCTION OF

THE RIGHT HON. SIR JOHN T. COLERIDGE: — The law of this country on the question of penalty, or liquidated damages, may now be considered, after a great number of decisions, not perhaps all of them strictly reconcilable with each other, to be, however, at length satisfactorily settled, and the hinge on which the decision in every particular case turns, is the intention of the parties, to be collected from the language they have used. The mere use of the term "penalty" or the term "liquidated damages," does not determine that intention, but, like any other question of construction, it is to be determined by the nature of the provisions and the language of the whole instrument. One circumstance, however, is of great importance towards the arriving at a conclusion; if the instrument contains many stipulations of varying importance, or relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation, applying generally to a breach of ail, or any of them, was intended to be a penalty and not in the way of liquidated damages.

MOOKEEJEE V. MASSEYK¹

132. A contract was made by a third party engaging himself to pay the debt of a debtor to his creditors, in a specified time and by instalments, provided the creditor granted a discount of about a third of the debt, and the agreement was entered in writing with the following condition: "If I fail to pay the whole of the 25,000 rupees, then the remission is not to hold good, and the remitted money will be justly due by me."

It was held, that this convention was different from that of a creditor engaging himself to remit to his debtor a portion of his demand, in consideration of punctually paying instalments, in which case the punctuality of payment is the only consideration for the indulgence; in such a case as the present, it is rather a certain than a punctual payment that the creditor had in view and, therefore, the penalty was not incurred by a default in paying an instalment.

TUDURY V. SANCHEZ DE PINA²

133. The term "owner," is to be understood as not intimating necessarily that the person is proprietor in fee simple of the whole, but that he is proprietor either in fee simple or for some term, or terms of years, or as to part in one mode, and as to the rest in the other.

THE BEACON LIFE AND FIRE ASSURANCE COMPANY V. GIBB³

134. The appellants insured a ship belonging to the respondent, and used for the contract a form generally em-

¹ Calcutta, 1860 July 18, Law Times N. S. 249.

² Gibraltar, 1862 June 19, XV Moore 434.

³ Lower Canada, 1862 Dec. 3, I Moore N. S. 73.

CONSTRUCTION OF

ployed to insure houses, which contained the following condition: "That if more than 26 lbs. of gun-powder should be on the premises at the time any loss happened, such loss should not be made good." The ship having been burned an action was taken by the insured for the amount of the policy.

The Judicial Committee held that the word "premises" being in the conditions of the policy, it must be understood to mean the ship, that is, the subject and thing previously expressed and referred to, and that according to the policy, the ship should not have carried more than 20 lbs. of gun-powder.

135. In construing instruments the real contract must be gathered from the contract itself, and the words and sentences used must be taken in their natural and ordinary sense; the intention of the parties is not to be searched for in external evidence or considerations.

136. In order to construe a term in a written instrument where it is used in a peculiar sense, different from its ordinary meaning, evidence is admissible to prove the peculiar sense in which the parties understood the word, but it is not admissible to contradict or vary what is plain.

LORD CHELMSFORD. p. 97:—Now the word "premises" although in popular language it is not applied to buildings, in legal language means the subject or thing, previously expressed, and the question here is, in what sense this word is used, which must be gathered from the contract itself, and not from any external evidence as *Lord Denman* says, in the case of *Rickman v. Carstairs* (5 Bar. & Ad. 663), "The question in this and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used."

Now the whole difficulty in this case—if really there is any difficulty—has arisen from the company taking a form of policy for insurance upon houses and buildings, and not striking out those conditions endorsed on the policy which were inapplicable to the subject matter insured, but leaving the question of the application of the conditions to the proviso in the body of the policy to this effect—"that this policy and the insurance hereby made shall be subject to the several conditions and regulations herein and hereon expressed, so far as the same are or shall be applicable." During the continuance of the policy, the steamer was entirely destroyed by fire, and the present action was brought against the company to recover the amount of the insurance. The declaration, it has been observed, negatives the fire having been brought within any of the exceptions which are contained in part of the seventh condition, thereby admitting that part, at least, of the condition enters into insurance.

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The company pleaded, amongst other pleas, that the policy of insurance in the declaration mentioned was made by the defendants under and subject to certain conditions and regulations therein and thereon expressed; and, among other things, that if more than 20 lbs. weight of gunpowder should be on the premises at the time when any loss happened, such loss would not be made good. And the plea averred, that at the time the *Tinto* was destroyed by fire there was on board the vessel a larger quantity of gunpowder than 20 lbs. weight.

The parties being at issue by the provisions of the provincial statute, the questions to be submitted to the jury were determined by the court; and one of those questions—the only one necessary to be considered—is the third, viz., at the time the said steamer *Tinto* was so consumed by fire, was there any quantity of gunpowder on board the said steamer, and, if so, what weight or quantity?

Upon the trial, that question, with the others was submitted to the jury, and they returned for answer, "Yes, we find that a package containing about 1000 lbs. of gunpowder was on board as freight, and which the owners of said steamer were not precluded by their policy from carrying."

It is quite clear—it is admitted, indeed, by all the judges, and there can be no question about it—that the latter words of this finding, "and which the owners of the steamer, were not precluded by their policy from carrying," were beyond the province of the jury. It was taking upon them to decide upon the construction of the contract. I suppose that the course in the province in these cases, where the jury are required by the provincial statute to find a special verdict—that is, not a special verdict as the term is understood in this country, but to answer distinctly to the different questions which are settled by the court to be proper to be submitted to them, is, that an application is afterwards made to the court to apply the verdict. Accordingly, such an application was made by the defendants in the action; and, in addition, there was a motion to strike out the words to which I have referred in the finding of the jury. There was, perhaps, no necessity for this motion, as the latter part of the finding of the jury might have been treated as mere surplusage; but the Superior court took it into consideration and decided that the words ought to be struck out from the answer of the jury, and then gave judgment for the defendants.

From this judgment there was an appeal to the Court of Queen's Bench, and after argument the court was divided, three judges being in favor of the respondents, and two in favor of the appellants. The judgment being also in favor of the appellants, there has been an equality of opinion amongst the judges who have had to decide the question in the courts of the province. Two of the judges, the Chief Justice and Judge Mondelet, who were in favor of the respondents, were of opinion that the word "premises" was applicable, in the seventh condition, to the case of a steamer, but their decision proceeded on the ground that a policy of insurance was a *contrat aléatoire*, which must be carried out in good faith, and that the company could not be relieved from their responsibility to answer for

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the loss without proof of deception and fraud, and a further proof that the fire had extended by reason of more than the limited quantity of gunpowder being on board. There was not the slightest ground for suggesting any deception or fraud on the part of the company; and as to its being necessary to give proof that the fire had extended by reason of a breach of the condition, this seems to introduce into the contract an entirely new term. It is important to observe, that in this very seventh condition there are instances in which the company have expressly stipulated that they shall not be liable for any loss or damage which has been occasioned by or through certain circumstances, as explosion in one case, and the use of camphine in another; thereby distinguishing in terms between those cases where the loss must be brought home to the specified cause, or to the use of the prohibited article, and the case in question of their not being answerable where there more than 20 lbs. weight of gunpowder on board; whether it has occasioned the loss or not. Badgley, J., in part of his judgment, seems to think that the condition is not applicable at all to the case of a steamer; but at the close of it he takes a different view, and says the contract may be fairly read as follows: — "We will insure your freight steamer; we know that gunpowder is an article of freight and transportation in steamers; but if you keep on board for use more than 20 lbs., and the vessel take fire, we shall not be responsible for the loss." Here, again, the contract is construed against the company by the introduction of words which entirely change its meaning and effect, and an absolute prohibition against having more than a certain quantity of gunpowder on board is rendered inapplicable by inserting the words "for use" into the condition. In the argument before their Lordships, it has been contended on the part of the respondents that, from the use of the word "premises," the parties could not have intended that the part of the seventh condition in question should apply to the steamer insured; and that there were extrinsic circumstances to show that it could not have been in the contemplation of the parties that the word "premises" should be so understood. In order to construe a term in a written instrument where it is used in a peculiar sense, different from its ordinary meaning, evidence is admissible to prove the peculiar sense in which the parties understood the word, but it is not admissible to contradict or vary what is plain. Now the word "premises" although in popular language it is applied to buildings, in legal language means "a subject or thing previously expressed"; and the question here is, in what sense this word is used, which must be gathered from the contract itself, and not from any external evidence. As Lord Denman says, in a case of *Rickman v. Carstairs* (5 B. and Ad. 663). "The question in this and other cases of construction of written instruments is, not 'what was the intention of the parties, but what is the meaning of the words they have used.' Supposing, however, that evidence was admissible in this case for the purpose of proving that, by the use of the word 'premises,' the parties did not intend to include the steamer, the subject matter of the insurance, what is relied upon appears to be entirely insufficient to render the condition inappli-

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cable. It is said that this insurance was upon a trading steamer; that it was the usage of steamers of this description to carry gunpowder on freight; that this was known to the company, and therefore, it must be taken that they did not mean to include this portion of the seventh condition in the insurance. But assume that it was notorious to the company that it was the usage of a steamer of this description to carry gunpowder upon freight, why should they not, for that very reason, desire to limit their risk by preventing more than 20 lbs. of such a hazardous article being carried at any one time? If the condition is not to be considered part of the contract, this strange consequence will follow; that it being clear to the parties insured that the company desire to guard themselves in the case of houses and buildings from the hazard of there being upon the premises at any one time more than a limited quantity of gunpowder, and having excluded gunpowder altogether from those hazardous risks for which an additional premium is to be paid, the conditions stating that gunpowder under the circumstances is to be insured, this steamer might, during the whole continuance of the policy, carry backwards and forwards cargoes of gunpowder, the company receiving no premium for the additional risk incurred; and in case of the vessel taking fire and being burnt, though not originally by an explosion, but of course the gunpowder contributing materially to extend the fire, the company would be answerable for the loss. The question then is, whether assuming under these circumstances that it was more probable that the prohibition with regard to the amount of gunpowder should be included in the contract between the parties than not, the word "premises" must not receive a reasonable construction, which would make it apply to this particular contract. Now it is quite clear that the popular sense of the word is excluded, because there are no buildings to be insured. Then it only remains to give it that meaning which the reasonable construction of the contract requires. Mondelet, J; says, that "The form of the policy is one which should not have been made use of relative to a steamer; but inasmuch as this policy, though improper, has been accepted by the insured, and they must be taken to have read it, since they have signed it, it is right and just that the word "premises" should be interpreted against them, and adjudged to refer between the parties to the steamer, which was the object, the sole object, insured."

If, then, this condition is applicable to the subject insured, the only question which arises upon it, is, whether the facts bring the case within the condition upon which the finding of the jury, that there was at the time of the fire more than 20 lbs. weight of gunpowder on board, is conclusive. Under these circumstances, it is quite immaterial whether fire was or was not occasioned by more than the specified quantity being on board.

The parties have agreed to this as a condition in the policy, and the cases which have been adverted to, of the effect of deviation upon marine insurance, are good illustrations of the way in which parties are bound by contracts of this description. It is familiar law that a wilful deviation, although the loss is not occasioned by, or attri-

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butable to it, exonerates the underwriters from liability. So, again, take a life policy. We know that in England, these policies invariably contain a stipulation that the insured is not to go beyond the limits of Europe.

Now, if the party insured goes, even for an instant, out of Europe, though without the least injury to his health, this condition of the policy attaches, and the policy becomes void. This being so, all that remains for their Lordships to say on the present occasion, is, that it being admitted that this condition is applicable to the case of the steamer, the subject insured, and it having been found that the condition has been broken, the judgment of the Superior court was a correct judgment, and the judgment of the Court of Queen's Bench reversing that judgment, cannot be supported. They will, therefore, recommend to her Majesty that the judgment of the Court of Queen's Bench be reversed, and the judgment of the Superior court be affirmed.

McCONNEL V. MURPHY ¹

137. Where in a contract for the sale and delivery of goods, the quantity is only determined in an uncertain manner by the terms "say" or "about," these words are words of expectation and estimate only, and do not amount to an undertaking that the quantity should be so much. In this case a contract for "*say about 600 spars*" was maintained, although 496 only were delivered.

SIR BARNES PEACOCK, p. 218: — In mercantile contracts, and indeed in all contracts where the meaning of language is to be determined by the court, the governing principle must be to ascertain the intention of the parties, through the words they have used, this principle is one of universal application.

It is seldom, in mercantile contracts, that any technical or artificial rule of law can be brought to bear upon this construction. The question really is the meaning of language, and must be the same everywhere. There may be rules to assist the courts in the construction of contracts in certain cases, and some have been referred to as existing in the law of Canada, but they do not interfere with the decision to which their Lordships have come. It may be clear that by the law of Canada a vendor cannot enforce a contract unless the thing which he has sold can be definitely ascertained. If the contract is so obscure that the subject matter of the sale cannot be identified or the terms of the sale defined, the vendor could not enforce the contract. So also in cases of doubt, it may be that the interpretation should be against the vendor, but that must be understood of cases of doubt which cannot be otherwise solved. It would follow from these rules, that where a stipulation is capable of two meanings equally consistent with the language employed, that shall be taken which is most against the stipulator and in favour of the other party.

¹ Quebec, 1873 April 22, L. R. V. P. C. 203.

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McLEAN V. MCKAY¹

138. It was stipulated in a deed of sale, that an adjoining piece of land, therein described "shall never be hereafter sold, but left for the common benefit of both parties and their successors."

In construing this clause, their Lordships held: *first*, that it was an agreement that this space shall be left open and unsold without any structure thereon, for the mutual enjoyment of both parties, but not that both should share the profits that might be raised out of the land; *second*, that this agreement did not contravene any rule of law; *third*, that the ownership remained in the original proprietor.

MARSHALL V. MACLURE²

139. In construing a contract in this case, their Lordships decided that the respondent, a member of a firm, having transferred to the respondents "his share" in a certain mortgage held by the firm, by those words, must be understood the "share" of his firm, and not merely his individual share as between himself and his partner.

GOVERNMENT OF NEWFOUNDLAND V. NEWFOUNDLAND RAILWAY COMPANY³

140. The respondent entered into a contract with the government for the construction and working of a railway to be made in a specified time. The government undertook to pay to the company an annual subsidy "to attach in proportionate parts and form part of the assets of the company as and when each five miles section is completed and operated; and also to grant 5,000 acres of land for each mile of railway completed, on the completion of each section of five miles." The company made part only of the road and assigned. Their assignees claimed a proportion of the subsidy and of the grant of land.

The Judicial Committee held that as each of the sections was completed, the right to 25,000 acres of land became perfect, without depending in any way on the completion of the whole line; that also on the completion of each section a proportionate part of the whole subsidy became payable as a separate subsidy, subject to the condition of continuous efficient operation of the railway.

141. It was also held that the government has the right

¹ Nova Scotia, 1873 May 9, L. R. V. P. C. 329.

² Victoria, 1885 March 17, L. R. X Appeal Cases 325.

³ Newfoundland, 1887 Feb. 7, L. R. XIII Appeal Cases 199.

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to set-off a counter claim for damages for breach of contract, on account of the non-completion of the entire line; and as the claim opposed in compensation and the action of the company have their origin in the same contract, the set-off has effect against the assignees of the company, *Watson v. Mid Wales Railway Company*, L. R. 2 C. P. 593; *In re Milan Tramway Company*, 22 ch. D. 122; *Watson v. Carl*, L. R. 2 C. P. 593; 25 ch. D. 522; *Bradford Bank v. Briggs & Co.*, 12 Appeal Cases 29; *Hopkinson v. Rold*, 9 H. L. C. 514 were examined and found not applicable. *Smith v. Parkees*, 16 Bea. 119; *Young v. Kitchen*, 3 Ex. D. 127 cited on the set-off claim.

HARDERN V. COMMERCIAL UNION ASSURANCE COMPANY ¹

142. Where there is ambiguity in a policy of insurance, and in order to understand it and find the intention of the parties, it is necessary to have recourse to oral evidence or to the examination of other documents, it is no more a question of construction, but a question of fact which should be left to the jury.

SENÉCAL V. PAUZÉ ²

143. Where in a document several persons agreed together to sell in an indefinite time certain specified debentures of a company to one of its officers at a specified price; but by the evidence adduced in the case and by the circumstances under which it was executed it appeared that the real intention of the persons signing the document was to limit for their common benefit their claims against the company, in order to facilitate some financial operation then contemplated, the Judicial Committee held that according to the evident intention of the parties, it was not a real agreement to sell for the benefit of the purchaser, but rather a trust for the benefit of all the interested parties.

FRAUD AND NULLITY IN See **FRAUD**.

LEGISLATION ON See **LEGISLATURE**: *legislative powers: iisdem verbis*.

LEX LOCI CONTRACTUS. See **INTERNATIONAL LAW**: *iisdem verbis*.

PERFORMANCE OF

VIVERS V. TUCK ³

144. Where a party has made *bona fide* a contract in ignorance or error and is prejudiced by it, a court of equity will

¹ New South Wales, 1887 April 23, LVI Law Times N. S. 240.

² Quebec, 1889 July 27, L. R. XIV Appeal Cases 637.

³ New South Wales, 1863 Dec. 1, I Moore N. S. 526.

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not order a performance of the contract. The remedy of the plaintiff is an action in damages for the non performance of the contract.

LORD JUSTICE KNIGHT BRUCE, p. 526: — It is not the habit of a Court of Equity, to decree the specific performance of an agreement more favourable to the plaintiff than to the defendant, invoking hardship upon the defendant and damage to his property, if he entered into it without advice or assistance, and there be reasonable ground for doubting whether he entered into it with a knowledge and understanding of its nature and its consequences.

OXFORD V. PROVAND ¹

145. In a suit for specific performance of a contract vague in its language, a Court of Equity having regard to the terms of such agreement before granting a performance of that contract will look at the surrounding circumstances, and the conduct of the parties in dealing with the property comprised in it, in the interval between the making of the agreement and the commencement of the suit for its enforcement.

SIR WILLIAM ERLE, p. 179: — The meaning of the maxim in Chancery, that he who seeks equity must do equity, is not clear, because equity has not been clearly defined. The maxim, as their Lordships understand it, includes the rule at law which in all suits upon contracts, either for specific performance or for damages, guides to discriminate whether an alleged breach of the duty of the plaintiff under the contract is a bar to the suit.

The rule has been expressed in various forms: the substance of it, as regards the present purpose, is, that such breach is a bar when it goes to the whole of the consideration for the promise sued on; but when it amounts only to a partial failure of such consideration, it is no bar to the suit, the defendant being entitled to recover in a cross-action compensation for such failure, if it should be proved to exist.

This rule has been of frequent application at law, as appears by the numerous decisions cited in the note to *Cutter v. Powell* 6 Term. Rep. 320; 2 *Smith's Leading Cases*, pp. 13, 146; 1 William Saunders, p. 320, c. d. e. Note *Portage v. Cole*.

SUBSTITUTION OF PARTIES.**DIMECH V. CORLETT ²**

146. One of the parties to a charter-party or other commercial contract has not the right, without the consent of the other, to substitute a third person in his place, simply on condition of being responsible for the solvency of this

¹ S. C. China and Japan, 1808 March 12, V Moore N. S. 150.

² Malta, 1858 June 22, XII Moore 199.

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person. If such substitution takes place the party substituting it does an act which amounts to a breach of contract, and a new contract is formed between the substituted party and the first party if this latter accept it.

THE RIGHT HON. SIR JOHN T. COLERIDGE, p. 222 : — It appears to their Lordships not easily reconcilable to reason or justice, that one party to a mercantile contract should have the power, without the privity or consent of the other, to substitute a third person for himself and in his place, simply on condition of being responsible for the solvency of that third person. The circumstances and the qualifications of the parties between whom a contract is made, are always material, in a greater or less degree. A change of the party on one side, even with the guarantee, alters the condition of the other party, affects the nature of his remedy, and makes the contract a new one. Some well-known exceptions in the general mercantile laws have been recognized, as in the case of negotiable or transferable instruments; but we are not aware that charter-parties have ever been included among these; and though some evidence may appear of a custom of this kind prevailing at *Alexandria*, yet nothing is shown as to the circumstances of its extent, notoriety, or qualifications; and there is nothing to show that it could bind the appellant, a Maltese shipowner. We think, therefore, the case is to be considered as if no such cession had been made.

REASONABLE TIME TO FULFIL AFISCHER v. NAICKER¹

147. A contract was made by which one of the parties bound himself to procure a certain sum of money to the other in eight days, the money being required by the latter to pay his pressing debts. But owing to circumstances the money was not furnished till nineteen days, and the borrower had been obliged to borrow money elsewhere in the meantime. Held that the delay of nineteen days was unreasonable and that consequently the agreement was not binding.

VOIDABLE See EVIDENCE : *iusdem verbis*, FRAUD, PRESCRIPTION : *iusdem verbis*.

COMPOSITION

See CREDITORS : *eodem verbo*.

CONTRACTOR

RESPONSIBILITY. See ARCHITECT AND CONTRACTOR : *eodem verbo*.

CONSTITUTIONALITY

OF LAWS. See LEGISLATURE : *legislative powers*, STATUTE : *construction*.

¹ Madura, 1860 March 7, 11 Law Times N. S. 95.

CONSTITUTION

OF CAPE BRETON. *See* CAPE BRETON.

OF THE CATHOLIC CHURCH IN CANADA. *See* CHURCH.

OF COURTS OF JUSTICE. *See* COURTS OF JUSTICE, JURISDICTION

CONSTRUCTION

See BOUNDARY, CHATTEL MORTGAGE, CONTRACT, MERCHANT SHIPPING, STATUTE, WILL.

CORPORATION

CAPACITY TO ACQUIRE IMMOVEABLES.

THE CHAUDIÈRE GOLD MINING COMPANY V. DESBARATS ¹

148. A trading or non trading corporation, foreign or Canadian, has no civil status and cannot acquire, or hold lands in the Province of Quebec without the permission of the Crown being first obtained under the forms prescribed by the statute. And if a corporation purchased lands without such authority, it has no action of damages against a remote warrantor even when its immediate vendor would have such action.

SIR MONTAGUE E. SMITH, p. 294 :—It was contended, on behalf of the Respondents, that, by the law of Lower Canada, corporations could not acquire land or an interest in it without the licence of the Crown, and, as a consequence, were not competent to maintain an action on a real warranty against a remote warrantor. It was further contended that if this were not so Desbarats had given an express warranty, which excluded the implied general warranty against eviction, and that this limited obligation gave no title to Foley, or to the appellants as his vendees, to maintain this action.

For the Appellants it was answered that the disabling law did not apply to trading corporations, whether foreign or domestic; and, further, that if it did embrace them, such corporations were not incapacitated from acquiring, but only from holding lands, and that in either view their action was maintainable, and it was denied on their part that the ordinary legal warranty against eviction arising upon contracts of sale was excluded by the terms of Desbarats' deed.

In the view their Lordships take of this case, it will not be necessary for them to determine the status and rights of foreign corporations in Lower Canada, or to what extent, if at all, they differ from corporations established in the Colony.

The law of the province deals liberally with foreigners. By the Civil Code, Article 25, aliens have the right to acquire and transmit moveable and immoveable property in the same manner as British-born or naturalized subjects; and by the Code of Civil Procedure,

¹ Quebec, 1873 July 29, L. R. V. P. C. 277.

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Article 14, foreign corporations may appear in all judicial proceedings in the Colony.

Whatever may be the effect of these Articles, it is sufficient to say that the Appellants cannot be in a higher or better position than a Colonial Corporation would be; and their Lordships, therefore, without further reference to the above distinction, will proceed to consider the principal question discussed by the Judges in the Court below, viz., the capacity of mining or trading corporation to acquire lands in the Colony.

By the old law of France and her Colony, before the Edicts of Louis XV issued in 1743 in the Colony, and in 1749 in France, corporations might acquire lands, but could not hold them without license from the Crown, if required to give them up. But these Edicts, which appear to be substantially to the same effect, incapacitated corporate bodies from acquiring as well as holding lands.

This distinction is very clearly stated by Pothier, "*Traité des Personnes*," Tit. 7, Art. 1.

He says: "Dès avant l'Edit de 1749, les communautés n'étaient pas à la vérité incapables d'acquérir des héritages; mais si elles pouvaient les acquérir elles n'étaient pas en droit de les retenir toujours. Elles pouvaient être obligées de vider leurs mains de ces héritages, soit par les seigneurs, de qui les héritages acquis par elles relevaient; soit par le Procureur du Roi, à moins qu'elles n'eussent obtenu du Roi des lettres d'amortissement, qui les rendissent capables de posséder et retenir ces héritages, en indemnisant les seigneurs."

He then explains that the right of the King to oblige Corporations "à vider leurs mains de ces héritages" was founded on reasons of public policy, and that of the seigneurs on their title to receive profits upon mutation of the lands on death and otherwise. Pothier further says: "L'Edit de 1749 a rendu les communautés absolument incapables d'acquérir aucuns héritages, comme fonds de terre, Les choses qu'il est défendu par cette loi d'acquérir, ne peuvent être acquises à quelque titre que ce soit, soit à titre gratuit, soit à titre de commerce."

The prohibitory force which the learned author ascribes to the Edict seems to be amply justified by the terms of it.

It was not denied by the counsel for the Appellants that Pothier had properly declared the effect of the Edict upon the Corporations with which it dealt; but they contended that these were religious and eleemosynary bodies only, and the modern trading corporations were not within its scope. There can be little doubt that the main object of the Edicts was to discourage the excessive endowment of religious houses, but the Edict of 1743 has words large enough to include secular bodies also. Article 1, after enumerating particular Corporations, has the general description, "autres corps et communautés ecclésiastiques ou laïques." And the prohibition to acquire lands contained in Clause 10 is directed against "autres gens de mortmain" as well as religious bodies.

It was argued that trading corporations could not be deemed "gens de mortmain," because their lands were not withdrawn from

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commerce, and were alienable. But the withdrawal of lands from commerce was only one, and not the main, reason of the law of mortmain, which was founded, as plainly appears from Pothier, not only on considerations of public policy, but on the loss to the Lords of their seigniorial rights.

Their Lordships, however, cannot consider it to be their duty, at this day, to construe the language of the Edict as alone containing the law of Canada on the subject of mortmain, because a legislative declaration of that law is, in their opinion, contained in the Code, which is free from ambiguity.

Tit. XI of the First Book of the Code, which treats of "Corporations," in terms includes every kind.

Art. 364 states: "Corporations are subject to particular disabilities, which either restrain or prevent them from exercising certain rights, powers, privileges and functions, which natural persons may enjoy and exercise; these disabilities arise either from their corporate character or they are imposed by law."

The disabilities arising from the law are stated in Art. 366, as follows:—

"1. Those which are imposed on each Corporation by its title, or by any law applicable to the class to which such Corporation belongs.

"2. Those comprised in the general laws of the country respecting mortmains and bodies corporate, prohibiting them from acquiring immoveable property, or property so reputed, without the permission of the Crown, except for certain purposes only, and to a fixed amount and value.

The Article refers, not to the Edict, but "to the general laws of the country respecting mortmain;" and their Lordships think that it declares the disabilities which attach by the general law of mortmain to all Corporations without distinction.

It may be here observed that this view of the Code is affirmed by the majority of the Judges in the Court of Queen's Bench in the present case, and is not denied by the two dissenting Judges. Mr. Justice Badgley refers to the Code in his judgment as follows:—

"Whatever doubts might have existed heretofore as to the prohibitive application of the old law with reference to merely trading Corporations, they have disappeared since the promulgation of the Code, which has declared those old law prohibitions to be and to have been our provincial law. The terms of the Code Article are too plain for a doubtful construction, and in their generality embrace all corporations (secular, lay, or trading), and subject them all to the same disqualifications to acquire real property, without the Royal or legislative permission first had and obtained."

These observations on the declaratory force of the Code are entitled to great weight, from the fact that Mr. Justice Badgley was one of the Judges who, in a case relied on by the Appellants (*Kierzkowski v. Grand Junction Railway Company*, 4 Lower Canada Jurist 86), expressed an opinion that trading corporations were not "gens de mortmain." In that case, however, the Railway

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Company had legislative powers to purchase lands, and the question arose incidentally in an action for seigniorial dues. Whatever may be the worth of the opinions expressed in that case, the higher authority of the Code must now prevail.

Their Lordships, for these reasons, think the Court of Queen's Bench was right in holding that the Appellants were incapable, without the license of the Crown, which it is not averred they possessed, to acquire any title to the lands sold to them by Foley. But before considering the effect of this disability on their right to maintain the present action, it will be convenient to advert to the nature and extent of the warranty upon the sale by Desbarats to Foley, of which the Appellants are seeking to avail themselves.

By the law of France prevailing in the Colony a warranty against eviction is implied in contracts of sale, but it is permitted to derogate from it by contract. Pothier says: — "*Le droit commun des contrats de vente qui oblige le vendeur envers l'acheteur à la garantie de la chose vendue, ne concernant qu'un intérêt particulier des acheteurs, il est permis aux parties de déroger à ce droit par conventions particulières.*" ("*Traité du Contrat de Vente*," Part II, chap. 1, sect. 2, Art. 7.)

The author then gives instances of conventions having this effect; one of them being: "*Celle par laquelle le vendeur stipule qu'il ne sera garant que de ses faits.*"

The Code of Lower Canada, in effect, embodies this law.

Article 1506 declares that the warranty to which the seller is obliged in favour of the buyer, is either legal or conventional.

Legal warranty is defined in Article 1508, and includes warranty against eviction by reason of any right existing at the time of sale.

Articles 1507, 1509, and 1510, declare the manner in which this warranty may be excluded or diminished, as follows:—

Art. 1507. "Legal warranty is implied by law in the contract of sale without stipulation. Nevertheless, parties may, by special agreement, add to the obligations of legal warranty, or diminish its effect, or exclude it altogether."

Art. 1509. "Although it be stipulated that the seller is not obliged to any warranty, he is, nevertheless, obliged to a warranty against his personal acts. Any agreement to the contrary is null."

Art. 1510. "In like manner when there is a stipulation excluding warranty, the seller in case of eviction is obliged to return the price of the thing sold, unless the buyer knew at the time of the sale the danger of eviction, or had bought at his own risk."

By the deed of sale Desbarats expressly bound himself and his heirs to warrant and guarantee Foley against all mortgages, debts and dowers whatever. There is no other express warranty. The terms of transfer are limited to the rights and interests Desbarats had, or could demand in the subject-matter of the sale.

It is evident that the eviction by the Crown is not a breach of the express warranty given by Desbarats. His liability for this eviction must, therefore, be founded, if it exists at all, on legal warranty.

It was insisted on the part of the Respondents that the legal war-

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warranty was excluded by the conventional warranty, upon the ordinary rule of construction, *expressum facit cessare tacitum*.

It is true that the conventional warranty of Desbarats does not contain the word "only," or other equivalent expression; but it seems to be a reasonable, if not a necessary, implication from the insertion of a limited conventional warranty, that it was the intention of the parties to exclude the larger legal one, and this implication is strengthened by the peculiar form of the conveyance, and by the disclosure in the deed of the fact that patents had not then been granted by the Crown; a disclosure which was not made in the conveyance, by Foley on his sale to the Appellants, for a price which was an enormous increase on that he had paid to Desbarats.

There appears, then, to their Lordships to be strong ground for holding that the legal warranty was excluded on Desbarats' sale; and that no action could have been maintained by Foley against Desbarats upon an eviction by the Crown; and if this is so, none can be maintainable against him by the Appellants for such eviction, even if they had been under no disability; because, in suing Desbarats as a remote warrantor, they can have no greater remedy against him than their immediate warrantor, Foley, to whose rights they are in effect subrogated by the operation of Article 126 of the Code of Civil Procedure.

It is not, however, necessary to rest the decision on this ground, because, assuming the legal warranty not to have been excluded on the sale by Desbarats to Foley, their Lordships think that the legal disability to purchase lands under which the Appellants are placed prevented them from acquiring the right to resort to it. Such a right can only spring from a valid sale, and the sale from Foley to them being invalid, by reason of their incapacity to purchase, the consequential right to sue Desbarats on a legal warranty could never arise. Whatever may be the case, as between Foley and the Appellants, it is evident that Desbarats, who was not a party to that sale, is not estopped from asserting its invalidity.

The Chief Justice of the Court of Queen's Bench was of opinion that, although the Appellants might be under a legal disability to purchase, the action was maintainable against Desbarats for the price as upon a failure of consideration. But the opinion appears to have been given upon the erroneous assumption that Desbarats had received the price paid on the sale by Foley, viz., 200,000 dollars, from the Appellants.

The right to restitution of the price is independent of warranty, and can be enforced, as it appears to their Lordships, only between the immediate parties to a sale.

Art. 1510 of the Code declares this right: — "In like manner, when there is a stipulation excluding warranty, the seller in the case of eviction is obliged to return the price of the thing sold, unless the buyer knew at the time of the sale the danger of eviction, or had bought at his own risk."

By the terms of this Article it is only when warranty is excluded that this obligation to return the purchase-money as between the immediate parties to the sale arises; and it cannot, therefore, be

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within Article 126, C.P.C., which is confined to the case of warranties.

Their Lordships in deciding this Appeal are dealing only with the action brought under this Article against Desbarats, and not with the rights (if any) which the Appellants may have against their immediate vendor Foley, either on his express engagements or for restitution of the price paid to him.

One other point remains to be noticed, viz., the contention on the part of the Appellants that although it is not averred in the Declaration that the license of the Crown had been obtained, the grant ought, upon demurrer, to be assumed until the contrary was shown by plea. Their Lordships cannot agree in this view. On the face of the declaration the Appellants were incorporated by the law of a foreign State, and were, according to what has been already decided, under a legal disability by the general law to acquire lands in Canada. Assuming that this disability might have been removed by a license from the Crown, it appears to their Lordships that it was for the Appellants to show it, since this license was essential to confer on them the legal capacity to purchase and to maintain the action. The grant also, if obtained, would be a fact peculiarly within their own knowledge, and ought, according to a reasonable rule of pleading, to have been averred by them.

This pleading point, it may be observed, is entirely beside the substance of the case; for there can be no doubt that, if a license had been really granted, the Appellants would have applied and been allowed to amend their Declaration and aver its existence.

In the result, their Lordships will humbly advise Her Majesty to affirm the judgment of the Court of Queen's Bench, and to dismiss this Appeal with costs.

LEGISLATION ON *See* LEGISLATURE : *legislative powers : iisdem verbis.*

NOTICE OF ACTION.

UNION STEAMSHIP COMPANY OF NEW ZEALAND V. MELBOURNE
HARBOUR TRUST COMMISSIONERS¹

149. The Melbourne Harbour Trust Act requires that in all actions to be brought against "any person" for anything done under this act, a previous notice in writing clearly setting forth the nature of the intended action, the name and place of the plaintiff and of his attorney, shall be given.

150. It was held *first*, that the word "person" in the act includes any corporation; *second*, that an ordinary letter written by the plaintiff's attorney not intended to be such notice is not in compliance with the act.

¹ Victoria, 1884 Feb. 6, L. R. IX Appeal Cases 365.

FOREIGN

BATEMAN V. SERVICE ¹

151. The *Western Australian Joint Stock Company Ordinance* of 1858 does not apply to foreign corporations doing business in the colony of *Western Australia*. Therefore, the members of these companies are not individually responsible for the debts of the company. *Bul'ely v. Schutz*, *Law Rep.* 3 P. C. 264.

POWER OF A RAILWAY COMPANY TO TRANSFER THEIR RIGHTS TO CONTRACTORS. See PRINCIPAL AND AGENTS: *power of delegation*.

POWERS OF DIRECTORS.

IRVINE V. UNION BANK OF AUSTRALIA ²

152. The articles of association of the Oriental Rice Company, limited, contained no limitation of their power of borrowing; but, the authority of the directors to borrow was restricted to half of the actually paid-up capital at the time of the borrowing. The directors had also the right to mortgage the company's property to secure its debt.

The Judicial Committee, in a suit between two mortgage creditors who claimed privity of hypothecs on the company's real estate, held, that the limitation of the power of borrowing and of mortgaging was merely a limitation of the authority of the directors conferred by the same article; that it was not part of the constitution of the company. Consequently, that it was not a limitation of the general powers of the company, or of the whole body of shareholders; and that the acts of the directors in excess of their authority might be ratified by the company and rendered binding. And this ratification can be legally made by a majority of the shareholders present, though not a majority of the shareholders of the company.

POWERS TO MORTGAGE.

BANK OF SOUTH AUSTRALIA V. ABRAHAMS & AL. ³

153. The power contained in a deed of settlement of a joint stock company authorizing the directors to hypothecate the property of the company, does not given them authority to include in such mortgage or charge future calls, or, in other words, unpaid capital of the company. *Stanley's Case*, 4 de G. J. and S. 407; S. C. 33 L. T. 536.

RESPONSIBILITY OF A RAILWAY COMPANY TOWARDS THIRD PARTIES. See PRINCIPAL AND AGENTS: *power of delegation*.

¹ Western Australia, 1881 Feb. 23, L. R. VI Appeal Cases 386.

² Rangoon, 1877 March 10, L. R. II, Appeal Cases 366.

³ South Australia, 1875 March 6, L. R. VII P. C. 562.

TRUST FUND.

DOBIE V. BOARD FOR THE MANAGEMENT OF THE TEMPORALITIES FUND
OF THE PRESBYTERIAN CHURCH OF CANADA ¹

154. When a trust fund has been entrusted to a corporation, subject to the payment of life annuities to its founders and others, each founder has an interest beyond the mere reception of his annuity, and can claim that the fund be administered in strict accordance with law. And he has also the right to enforce in law the performance of the agreed conditions of the foundation.

VOTING.

NORTH-WEST TRANSPORTATION CO. V. BEATTY ²

155. If a contract of sale is made by the directors of an incorporated company with one of them, which although voidable, is made in good faith and not in excess of the directors' powers, it does not preclude such vendor from exercising his voting power as a shareholder in a general meeting to ratify such contract.

156. And if to obtain a majority, the director who has made such contract, use means authorized by the constitution of the company, as *e. g.* voting by proxies, the votes will not be set aside.

SIR RICHARD BAGGALLAY, p. 593: — The general principles applicable to cases of this kind are well established. Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject matter opposed to, or different from, the general or particular interests of the company.

On the other hand, a director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director. Any such dealing or engagement may, however, be affirmed or adopted by the company, provided such affirmation or adoption is not brought about by unfair or improper means, and is not illegal or fraudulent or oppressive towards those shareholders who oppose it.

¹ Quebec, 1882 Jan. 21, L. R. VII Appeal Cases 136.

² S. C. Canada, 1887 July 21, L. R. XII Appeal Cases 589.

CORPORATION (MUNICIPAL)

CREATION OF

GRAHAM V. BERRY¹

157. The colonial Act gives power to the Governor in Council to establish new municipalities by proclamation, but before acting, a petition has to be presented to him signed by the resident householders. A petition was accordingly presented by certain householders proposing certain boundaries therein described, but the Governor in his proclamation described this new municipality in very different terms from those set out in the petition, including lands which the petitioners had not asked to be included, and omitting lands which the petitioners had prayed to have included. That irregularity was held fatal to the validity of the proclamation, and, consequently, the municipality in question was not duly constituted or created in point of law.

POWERS OF

SLATTERY V. NAYLOR²

158. Power was given by Act of Parliament to a municipality to make by-laws regulating the interment of the dead.

It was held that a by-law made by that municipality prohibiting the interment of the dead within a certain distance from any building, house, street, road, etc., whereby a certain place or piece of land bought by the appellant in a cemetery was lost, as this cemetery was within the distance prohibited, was *intra vires* and legal.

LORD HOBHOUSE, p. 449:— But a statute cannot be so construed if it shows an intention to overrule the private rights in question. The object of the present statute is to establish regulations for the common advantage of persons, who have come to live in the same community, in a great number of matters affecting their daily life, and that cannot be done except by interference with many actions and many modes of enjoying property, which, but for such regulations, would be lawful and innocent. It is difficult to see how the council can make efficient by-laws for such objects as preventing fires, preventing and regulating places of amusement, regulating the killing of cattle and sale of butcher's meat, preventing bathing, providing for the general health, not to mention others, unless they have substantial powers of restraining people both in their freedom of action and their enjoyment of property.

The interment of the dead in question is just one of those affairs in which it would be likely to occur that no regulation would meet the

¹ South Wales, 1865 March 14, III Moore 205.

² New South Wales, 1888 March 24, L. R. XIII Appeal Cases 446.

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case except one which wholly prevents the desired or accustomed use of the property. It may well be that a plot of ground having been originally far from habitations and suitably used as the burying place of a family or a religious society has been reached by the growing town, and has so become unsuitable for the purpose. In such a case a power to regulate would be nugatory unless it involved a power to stop the burials altogether.

P. 450:—To regulate the place of burial is certainly one of the most important points in regulating burials for the health of a community, perhaps the most important of all. It is indeed serious to prevent people from indulging their affections in a matter which they justly consider so sacred as the disposal of their dead. Such prohibitions should be well considered before they are passed. But they are undoubtedly necessary in large and growing communities. And their Lordships cannot hold that a by-law is *ultra vires* because in laying down a general regulation for the borough of Petersham it has the effect of closing a particular cemetery.

RESPONSIBILITY OFBOROUGH OF BATHURST V. MACPIERSON¹

159. A municipal corporation constructed in a street under its control a barrel drain. The brick-work of this drain having broken away, a hole was formed, and the plaintiff's horse fell into it, the plaintiff receiving wounds and breaking his leg. The corporation was held responsible in damages.

160. Their Lordships, on the principle that in this case there were grounds for an indictment, held therefore, that there must be an action at the suit of any person who sustains direct damages as there would be against a public officer abusing his office, either by commission or omission.

White v. Hindley Local Board of Health, L. R. 10 2 B. 219; *Henley v. Mayor and Burgesses of Lyme Regis*, 5 Bing 101; S. S. in error 3 B. & A. 77, and 8 Bli. (N. S.) 690; *McKinnon v. Penson*, 8 Ex. 327; *Atkinson v. Newcastle Waterworks Co.*, 2 Ex. D. 441; *Hartwell v. Ryde Commissioners*, 5 B. & S. 361.

RESPONSIBILITY OF MEMBERS OF MUNICIPAL COUNCILS.BOWES V. THE CITY OF TORONTO²

161. The corporation of the City of *Toronto*, in *Canada*, were authorized to issue debentures to a certain amount, to help in the construction of *The Toronto, Simcoe and Lake Huron Union Railway*. The appellant was then the mayor and a member of the Finance Committee, and took an active part in passing a by-law which authorized the issue of the

¹ N. S. Wales, 1879 March 11, L. R. IV P. C. 256.

² Upper Canada, 1858 Feb. 15, XI Moore 463.

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said debentures. The corporation assigned to the contractors of the railway some of the debentures which were sold by the contractors to a firm of which the appellant was a member. The firm afterwards sold the debentures bought from the contractors without the knowledge of the corporation and made a large profit on them.

The Judicial Committee, in an action to account, held that the appellant must, under the circumstances, considering the manner in which he acted throughout the transaction, be treated as the trustee of the corporation; that he was not entitled to any benefit received from the sale of the debentures; and was liable to account to the corporation for the ascertained and unquestioned amount of profit made and received by him in the transaction in which he had engaged in respect of the sale of the corporation debentures.

162. And, held further, that it made no difference that the profit from the sale of the debentures was made by a firm and not by the appellant alone, or that the corporation did not lose anything, and that this governing body would have acted exactly as it did if the appellant had not been a member of it.

LORD JUSTICE KNIGHT BRUCE, p. 517: — The decree deals with the appellant as an agent or a trustee who, while acting in the agency or trusteeship, acquired for himself by contract, without the knowledge of the persons for whom he was agent or trustee, an interest in the subject of the agency or trusteeship, and is accordingly incapable of retaining from them the benefit, if any, of the acquisition. And, it has scarcely been denied in the argument, that if the appellant stood in the relation of agent or trustee towards the corporation or inhabitants of *Toronto*, the decree (subject to the point of *Hall's* absence) has charged the appellant rightly. The relation, however, was disputed; but, as their Lordships think, unsuccessfully. He may not have been agent or trustee within the common meaning or popular acceptance of either term, but he was so substantially; he was so within the reach of every principle of civil jurisprudence, adopted for the purpose of securing, so far as possible, the fidelity of those who are entrusted with the power of acting in the affairs of others. If the appellant, as to the matters subsisting in the year 1851 and 1852 respectively, between the corporation upon one hand and the contractors and Railway Company on the other, so far as the appellant had anything to do with them, was not *negotiorum alienorum gestor*, it seems difficult or impossible to say that any person ever was so. It is evident, we think, that as a member of the corporation, and as mayor, he took part in those matters before and after the evil day of the 24th June 1852, to an extent more than sufficient to incapacitate him from dealing as he did with *Hincks* and the contractors, unless for his own loss, if there should be loss, and for the gain of the corporation, that is to say, of

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the inhabitants of *Toronto*, if there should be gain. The able counsel for the appellant did not suggest that in the case of a private man of property having occasion and desiring to raise money by issuing debentures payable as to the principal at a distant day, but with intermediate interest, and employing an agent for the purpose, the agent could act in the matter, with regard to the debentures, analogously to the manner in which the appellant acted here, as to those in question, and retain the profit from his principal. The difference between the two cases appears to their Lordships accidental merely, and immaterial. It was incumbent on the appellant, while the affair of the debentures was pending and unsettled, not to place himself voluntarily in a position in which, while retaining the office of mayor, he would have a private interest that might be opposed to the unbiassed performance of his official duty. But he did so. In all the steps on the part of the corporation connected with the debentures that took place between the 24th of *June* and the 2nd of *November*, 1852,—and they were important—the appellant, so far as he acted—and he did act—in the character of a member of its governing body, was under a bias, by reason of his private interest; for in truth and effect, from a time preceeding *July*, 1852, he stood, as to the debentures, in the position of the contractors.

The defence has been also to a great extent rested on the alleged ground that the appellant did not give wrong advice to the governing body of the corporation, or exercise influence over it in the matter of the debentures; that the governing body would have acted exactly as it did if the appellant had not been a member of it, that the corporation took altogether a prudent and correct course, and has lost nothing; and that any person not connected with it might honestly, safely, and effectually have made the bargain with *Hinks* and the contractors which the appellant did make. Assuming the alleged facts thus stated to be stated accurately, we conceive that they make no difference.....

P. 523 :— It has been also argued that the governing body of the corporation was a deliberative body, and on that ground out of the operation of any civil rules or principles applicable to agents and trustees; and the reported cases of *Lord Petre v. The Eastern Counties Railway* (1 Railway Cases, p. 462), and *Simpson v. Lord Howden* (3 Myl. & Co., p. 97), were mentioned; and it was said, that members of the British Legislature often vote in Parliament respecting matters in which they are personally interested, and do so without censure or risk. We are of opinion, however, that neither the governing character nor the deliberative character of the corporation council makes any difference, and that the council was in effect and substance a body of trustees for the inhabitants of *Toronto*; trustees having a considerable extent of discretion and power, having also duties to perform, and forbidden to act corruptly. With regard to members of a Legislature, properly so called, who vote in support of their private interests; if that ever happens, there may possibly be insurmountable difficulties in the way of the practicable application of some acknowledged principles by courts of civil justice, which courts, however, are nevertheless bound to

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apply those principles where they can be applied. The common Council of *Toronto* cannot in any proper sense of the term be deemed a legislative body; nor can it be so treated. The members are merely delegates in and of a provincial town for its local administration. For every purpose at present material, they must be held to be merely private persons having to perform duties, for the proper execution of which they are responsible to powers above them. We are agreed that the cases of *Lord Petre v. The Eastern Counties Railway* and *Simpson v. Lord Howden* must at present be viewed as correct expositions of English law; but so viewed, they do not, we conceive, affect the controversy before us.

RIGHT TO CLOSE STREETS.**THE MAYOR & AL. OF MONTREAL V. DRUMMOND**¹

163. A municipal corporation having by its charter the right to close streets generally, and no mention being made in the act of any indemnity to be paid to proprietors in the streets closed, does not in closing the end of a public street make any *expropriation* or any trespass, "*voie de fait*," and therefore, cannot be condemned to pay any indemnity to said proprietors.

164. Held also, that whatever may be the right of the proprietors to damages, they cannot demand them by action at common law, but the damages must be determined by the Commissioners in expropriation under 27 & 28 Vict. ch. 6.²

SIR MONTAGUE E. SMITH, p. 402: — The authority under which the Corporation closed the street is a by-law made in pursuance of an Act of the Provincial Legislature (23rd Vict. c. 72).

Section 10 of this Act authorized the Council to make by-laws for various purposes, and among others (sub-section 6), "to regulate, clean, repair, amend, alter, widen, contract, straighten, or *discontinue* the streets, squares, alleys, highways, bridges, side and cross-walks, drains and sewers, and all natural water courses in the said city."

A general by-law was afterwards passed, section 3 of which is as follows:—

"The Council of the said City of Montreal may, and they are hereby authorized whenever, in their opinion, the safety and convenience of the inhabitants of the city shall require it, to *discontinue* any street, lane or alley of the said city, or to make any alteration in the same, in part or in whole."

And subsequently, on the 11 September, 1866, a special by-law relating to St. Felix street was made, which, after reciting that it

¹ Quebec, 1876 May 16, L. R. I Appeal Cases 384.

² This decision was commented on and criticized in the case of *Morrison v. The Mayor & al. of Montreal*, IV L. N. 25, (1880) by the Court of Queen's Bench, (in appeal). The principles here decided were not followed; and a claim for damages against the City of Montreal before the ordinary courts, under the same Statutes, was maintained in principle.

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was deemed expedient in the interest of the public to open a new street (describing it)," and to discontinue a portion of St. Felix street," ordains and enacts, that a new street called Albert street be opened, and that a section of St. Felix street, describing by a plan and measurement (being the part to the south of the plaintiff's houses) "be henceforth discontinued."

It was not disputed that under those powers the Corporation might lawfully discontinue this portion of the street, but it was contended that they were bound, as an antecedent condition to indemnify the plaintiff for the damage he would thereby sustain, and that erecting the barrier before doing so was an unlawful act and a trespass. The whole case, indeed, of the plaintiff, so far as this action is concerned, rests on the assumption that his property has been invaded in a way to constitute "une expropriation," which, it was urged, could only be lawfully effected in conformity with Article 407 of the Civil Code of Lower Canada, "upon a just indemnity previously paid." It was argued that the Statute giving the power to make by-laws to discontinue streets should be held to have been passed subject to the general law embodied in this Article.

Article 407 runs thus: "No one can be compelled to give up his property except for public utility, and in consideration of a just indemnity previously paid."

A similar Article is found in the Code Napoléon (Article 545).

These Articles undoubtedly embody a fundamental principle of the old French law, which, whilst allowing private property to be taken for purposes of public utility, asserted its generally inviolable nature by requiring previous payment of a just indemnity. They are found both in the French and Canadian Codes under the title "De la Propriété," and in both follow the Articles which define property or ownership.

The original Article in the Code Napoléon was in effect the declaration of a principle which, in France, has been applied by numerous special laws. In the Canadian Code, also, Article 407 is supplemented by Article 1589, which is as follows:—"In cases in which immoveable property is required for purposes of general utility, the owner may be forced to sell it, or it may be expropriated by the authority of law, in the manner and according to the rules prescribed by special laws."

In the special laws passed both in France and Canada, the principle of previous indemnity in cases of "expropriation," properly so called, appears to have been generally maintained. But exceptions have been made in works of urgency: and it is obvious that special laws, when passed by competent authority, may adopt, reject, or modify this principle.

A distinction has long been made in France, and indeed it exists in the nature of things, between "expropriation," properly so called, in respect of which previous indemnity is payable, and simple "dommage;" and a further distinction between direct damage, which gives the sufferer a right to compensation, and indirect damage, which does not.

Great research was displayed by the learned counsel on both sides

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in investigating the history of French law and procedure on these subjects, the powers conferred on the Tribunals, and the conflicts between them. According to the opinion of Dalloz the first complete system of procedure is to be found in the Law, 8 Mars, 1810. A short history of this and other laws upon the subject will be found in Dalloz's "Répertoire," tit. "Expropriation," c. 1.

It is sufficient for the present purpose to note that a conflict arose under these laws between the ordinary Courts of law and the Administrative Tribunals, during which numerous decisions bearing on the present controversy took place. It was settled, at least after the law, 8 Mars 1810, that the Courts of Law alone had jurisdiction to decide on the indemnity payable to owners of property in cases of expropriation, and that the province of the Administrative Tribunals was confined to cases of damage, but conflicts constantly arose as to whether particular cases fell within one or the other category, and the claims of owners of houses to indemnity for injury to their servitudes or quasi servitudes in public streets were a fertile source of them.

Demolombe adverts to these conflicts in his "Traité des Servitudes," and thus sums up the controversy. (Vol. 12, Art. 700.) Assuming, as he does, that the owners of houses bordering on streets are entitled to indemnity when "leurs droits d'accès ou de vues ou d'égouts," are suppressed, or injuriously affected, he asks what is the competent authority to determine their claims? His answer is, "Cette question est elle-même fort délicate. C'est le pouvoir judiciaire suivant les uns puisqu'il s'agit d'une question de propriété privée. C'est au contraire, d'après les autres, le pouvoir administratif, parce qu'il ne s'agit pas d'une véritable *expropriation*, mais seulement d'un simple *dommage*, quoique ce dommage soit permanent, et nous avons déjà dit (referring to vol. 9, Art. 567), que telle paraît être aujourd'hui, après beaucoup d'hésitation et de luttes, la doctrine généralement suivie." Delalieu, in his "Traité de l'Expropriation," arrives at the same conclusion. (See Art. 152, 6th Edit., pp. 85 to 87.)

No doubt in some of the French decisions and authorities the violation of rights of this kind has been treated as "une expropriation réelle." But in others it has been spoken of as being only analogous to it, as thus: "comme s'il subissait une expropriation réelle d'une partie de sol." (See Delalieu, p. 86; Curasson, p. 211.) Be this as it may, the result of the decisions appears to be correctly summed up by Demolombe, and it would seem that in France at the present day damage to rights such as "droits d'accès" to streets is not deemed to constitute "expropriation." Indeed, upon a reasonable construction of the language of Art. 407 of the Code, it seems to apply to property which can be actually ceded, and for which indemnity could be fixed before it was ceded.

The compensation allowed in France for "dommage," as distinguished from "expropriation," seems to be founded on an equitable principle which the special laws have adopted subject to the regulations prescribed in them. But claims for damage, other than that arising from the cession of property, being for the loss caused

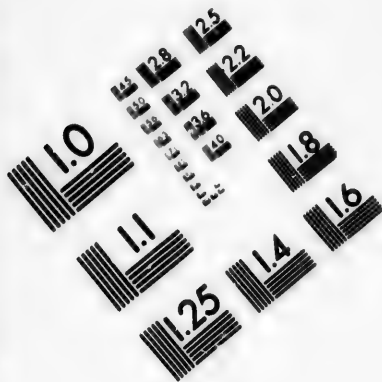
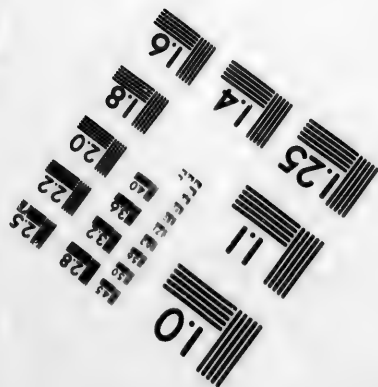
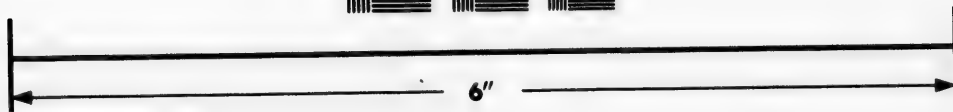
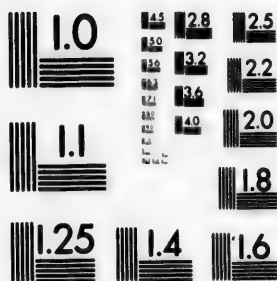


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by the execution of the works and as a consequence of them, it would be unreasonable to require previous indemnity; indeed, in many cases, the extent of damage cannot be previously ascertained. The discussion between the damage which grows from an expropriation, and that which arises from the execution of the works ("l'exécution ultérieure des travaux"), is plainly put and illustrated by Delalieu. The latter, he says, is, "non la suite de l'expropriation, mais la suite de l'exécution des travaux," and he shows how in the nature of things the indemnity for it cannot be assessed beforehand, but should be the subject of a subsequent inquiry, even in the case where an actual expropriation has taken place. (See Delalieu, Art. 301 to 305.)

Assuming, then, that the plaintiff had rights in St. Felix street which have sustained damage, their Lordships think he has failed to establish an expropriation, or an injury which would give him a right to preliminary indemnity, so as to make the Corporation wrong-doers, and their act on closing the street a trespass, and "une voie de fait," because such indemnity had not been paid. It seems to them that if he has any claim, it is one to be prosecuted under the provisions of the Act relating to expropriations by this Corporation (27 and 28 Vict., c. 60) which will be hereafter considered. (See on this point Jones and Stanstead Ry. Co., L. R. 4 P. C. 98.)

Their Lordships observe that one of the grounds on which Mr. Justice Taschereau has sustained the action, instead of sending the plaintiff to the Special Tribunal constituted by the Act referred to, is that the parties had submitted to the jurisdiction of the Court, but they are unable to find sufficient evidence of submission or consent in the record to justify this conclusion.

Whilst upon the considerations just referred to, it seems to their Lordships that the present action is misconceived, they are reluctant to determine the case, without considering the other points (more nearly touching the merits of the claim) which were argued at the Bar. These were: that the plaintiff had suffered no injury which, by the French law, would give a right to indemnity: and that, if this were not so, the legislation authorising the act which caused the damage, had taken away the right of action, without providing compensation.

It cannot be denied that the law of France allows to the owners of houses adjoining streets rights over them, which, if not servitudes, are in the nature of servitudes. Demolombe enumerates as undoubted the rights "d'accès ou de sortie, des vues, et d'égouts," (vol. 12, sec. 699) and the same rights are spoken of by Proudhon (vol. 1, Art. 369). The right of access to a house is of course essential to its enjoyment, and if by reason of alterations in the street the owner cannot get into or out of it, or is obstructed in doing so, there seems to be no doubt that by the law of France he is entitled to recover, in some form, indemnity for the damage he sustains. But the stopping of a street at one of its ends does not produce these consequences. The occupiers of the plaintiff's houses can go from them into St. Felix street, and pass from it into other

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streets, and through them into all parts of the City. The only effect of making the street a *cul de sac* as far as the rights of access and passage are concerned (apart from the loss of customers, to be presently noticed) is that the plaintiff's tenants have to go by other streets and further to reach the southern part of the city.

The Counsel for the plaintiff contended, indeed, that a right of passage throughout the entire street belonged to the owner of every house in it as a servitude, and undoubtedly they were able to refer to some authorities in favour of this view; but the weight of authority appears to be the other way. With all their industry the learned Counsel were unable to find, in the mass of French decisions on this subject, a single case in which it has been held that closing one end only of a street was an interference with the rights of access and passage which gave a claim to compensation. On the other hand, several authorities and decisions were cited to the contrary. Demolombe, in discussing the right of access and other rights in streets (which he acknowledges are servitudes that cannot be interfered with by the Administration without making compensation), considers the passage a man enjoys over that portion of a street, which is not necessary for immediate access to his house, to be, not a right, but only an advantage of which he may be deprived without compensation. And among the instances of interference with mere advantages, as distinguished from rights, he gives the following: — "Comme si par exemple l'Administration diminuait la largeur de la place ou de la rue, ou même si elle fermait la rue par l'un de ses bouts, de manière à en faire une impasse." (Vol. 12, sec. 699.)

In Dalloz, "Répertoire," tit. "Travaux Publics," sec. 816, it is said that to give a claim to indemnity, according to the constant jurisprudence of the Conseil d'Etat, the damage must be material, and the direct and immediate consequence of the works executed by the Administration, and that for indirect damage no indemnity is due. And in Section 818 he gives as an instance of indirect damage, "La dépréciation causée à une maison située dans une rue, qui par suite de travaux publics a été fermée à une de ses extrémités, alors qu'elle reste, du côté opposé, en communication avec d'autres rues."

In Dalloz, "Recueil," 1856, part 3, p. 71, an important Arrêt of the Conseil d'Etat is set out, given in a case in which the owner of a house in a street at Toulouse, one end of which had been closed, claimed an indemnity of 40,000 fr. One of the considérants of this Arrêt, which affirmed the judgment of the Conseil de Préfecture rejecting the claim, is as follows:—

"Considérant que si la Rue de l'Orme-sec a été fermée aux voitures à celle de ses extrémités qui aboutissait à la dite place, elle est restée ouverte du côté opposé, et se trouve encore en communication avec la nouvelle rue de l'Orme-sec, qu'ainsi la dite maison n'ayant pas été privée de son accès à la voie publique, la dépréciation qu'elle aurait pu éprouver ne constituerait point un dommage direct et matériel qui pût donner droit à une indemnité, etc.

It certainly then appears that in France the depreciation caused to a house by stopping one end of a street, supposing it to remain open at the other, is not regarded as an interference with a servi-

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tude, nor (standing alone) such direct and immediate damage as will give a title to indemnity; and if this be so, there seems to be no reason or authority for declaring the law to be otherwise in Canada.

The authorities referred to leave untouched the question whether, if a street were stopped at both its ends, indemnity would be payable. It is enough to say that should such a case arise, it might possibly be contended with effect that a virtual destruction of the undoubted rights of access to the houses in the street so closed had been occasioned which would give to their owners a title to indemnity.

It was further contended for the plaintiff that beyond the mere passage through the street of which the occupiers of his houses were deprived, he had sustained special damage by reason of the loss of customers, who formerly came from the railway station into the street and were now prevented from doing so, and that thus the value of his houses for the purpose of the particular trades carried on in them was depreciated.

But it is to be observed that there was no authorized road from the railway station to this street, and the people who came into it from the station did so in an irregular manner, and by passing over the lines and works of the railway, in contravention of the by-laws of the Company. This source of profit was obviously of a precarious kind, and cannot be regarded as permanent. The street does not appear to have been much used, being inconvenient, if not dangerous, from the frequent passing of railway trains, and, apart from the custom of the railway passengers, no special advantage seems to have been derived from its being a thoroughfare. French cases were cited to the effect that the loss of customers (unless, indeed, the right of access as before interpreted is infringed) would not be such a direct and immediate damage as would give a claim to indemnity. (See Dufour, "*Droit Administratif appliqué*," 275, 277, 333.) A similar decision was given by the House of Lords in *Ricket v. Metropolitan Railway Company*, L. R. 2 H. L. 175.

Whether, if the closing of the street had cut off the plaintiff's houses from a place the occupiers had long used in connection with them, as from a wharf upon a public river, or had rendered the immediate approach to the houses difficult or inconvenient, he would have been entitled by French law to indemnity upon the principle on which two English decisions, turning upon facts of the kind just supposed, were determined, it is unnecessary to consider. But the present case differs from the supposed ones. The immediate access to the houses is not obstructed, and the occupiers of them had no special object beyond that of their neighbours in going to the part of the city which lies south of the barrier. Indeed, there is no evidence that any inconvenience was felt on this score, and probably none could have been given, for there appears to be another street, easily accessible to the occupiers of the plaintiff's houses, by which this part of the city can be reached, and which whilst only a little further, is probably more commodious, being less liable to obstructions from the operations of the railway. The gravamen of the damage, as proved, was the loss of the custom of the railway passen-

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gers already adverted to. No doubt the distinctions on the cases on this subject are fine. The English decisions (which are only referred to by way of illustration) as well as the French have been conflicting, and the boundary lines between them are in consequence somewhat indistinct. (See Metropolitan Board of Works v. McCarthy, L. R. 7 H. L. 213; Becket v. Midland Railway Company, L. R., 3 C. P. 97.)

One ground of damage complained of is due not to the discontinuance of the street, but to the manner of closing it. It is said the barrier which has been erected darkens the plaintiff's houses.

It may be that the plaintiff has some ground of complaint on this head, but he has not alleged in his declaration that the windows of his houses have been deprived of light, but only that the street has been darkened; nor does the evidence distinctly show a deprivation of light to an actionable degree, nor is such a deprivation found as a fact by the experts or the Judges. The great contest in the cause has been as to the damage arising from the suppression of the street, and not that due to the form of the barrier. Throughout Mr. Justice Taschereau's judgment, in which that learned judge ably supports his own view, there is no allusion to loss of light as a substantive grievance. If, however, this or other damage has been occasioned by the proximity of the barrier it would be recoverable, if at all, under the Corporation statutes. The amount of damage assessed in the action is, in the main, given in respect of loss of custom and the consequent depreciation in the value of the houses.

The other questions argued turned upon the special Statutes relating to the Corporation. It was contended that these Acts excluded an action for indemnity, and gave no compensation in cases like the present. For the plaintiff it was denied that the action was thus excluded, but it was said that, if taken away, compensation was given.

Upon the English legislation on these subjects, it is clearly established that a Statute which authorizes works makes their execution lawful, and takes away the rights of action which would have arisen if they had been executed without such authority. Statutes of this kind usually provide compensation and some procedure for assessing it; but it is a well understood rule in England that though the action is taken away, compensation is only recoverable when provided by the Statutes and in the manner prescribed by them. In practice it is generally provided in respect of all acts by which lands are "injuriously affected" — words which have been held by judicial interpretation of the highest authority to embrace only such damage as would have been actionable, if the work causing it had been executed without statutable authority.

In the Canadian Act (23 Viet., c. 72, authorizing the by-law in question, no compensation is expressly provided for the damage which may be caused by any of the acts it authorizes to be done. But in a previous Act (14 and 15 Viet., c. 128), provision for compensation is expressly made in two instances. Thus, the power to make by-laws for altering the footpaths or side-walks of any street is conferred subject to the provision "that the Council shall make

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compensation out of the funds of the city to any persons whose property shall be injuriously affected by any such alteration of the level of the footpath in front thereof." And the power to make by-laws for changing the sites of markets and appropriating the sites, saves to any party aggrieved "any remedy he may by law have against the corporation for any damage he might thereby sustain."

The Counsel for the corporation referred to two or three other instances of express provisions in former acts relating to this corporation, and also to sets of acts authorizing roads, bridges, and other public works, which provided compensation in express terms, and contended that it might be inferred from this course of legislation that the intention was to exclude compensation, whenever it was not expressly given.

On the other hand, the counsel for the plaintiff relied on the fact that no compensation was provided by the act authorizing the bye-law in question, although the power it conferred would, it was said, justify an interference with property, and with undoubted servitudes, and also upon the difference between English and French law, arising from the existence of the article of the Code, and the dissimilar systems of procedure in the two countries. Their contention, in substance, was that the special acts should be read as subject to article 407 of the Code in the cases to which it was applicable, and also to the general law which gave in certain cases at least, a right to indemnity for damage.

Whatever may have been the effect of the special Acts relating to this corporation before the passing of the 27 and 28 Viet., c. 60, they must now be read and considered with it. The Act is indeed Statute upon expropriations. After reciting in the preamble that such difficulty was often experienced in carrying out the law in force relating to expropriations for purposes of public utility, it establishes a tribunal consisting of commissioners for determining the value of property expropriated, and a system of procedure for such cases. Then the 18th section enacts that these provisions shall be extended to all cases in which it becomes necessary to ascertain the compensation to be paid for any damage sustained by reason of any alteration in the level of footways made by the Council or by reason of the removal of any establishment subject to be removed under any by-law of the Council, "or to any party by reason of any other act of the Council, *for which they are bound to make compensation.*"

It was contended for the corporation that this general clause referred only to such compensation as was expressly mentioned in their Statutes, though they could only point to two instances of such compensation which could satisfy the words, and these were contained in a Road Act. (36 Geo. III. c. 9), the powers of which were transferred to the corporation. Whilst, for the plaintiff, it was said that if it be held that actions for indemnity are taken away, this sweeping clause ought to be construed so as to comprehend all cases of damage for which, by the general law, indemnity would be due, and as being, in effect, equivalent to the common clause in the English Statutes containing the words "otherwise injuriously affected."

Reading the clause in the latter sense, compensation would be ex-

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expressly given by it to all who may suffer—to use the English phrase—actionable damage. A provision to this effect, if it be made, would no doubt be equitable and reasonable; whereas, if it be not made, the scheme of compensation provided by these acts would seem to be defective. Their Lordships, however, do not think it necessary to decide in this appeal the question thus raised;—since, in whatever manner it may be determined, and whatever may have been the case before the 18th section of the 27th and 28th Vict., c. 60, was passed, they think that this enactment, by requiring that the compensation payable to any party “by reason of any act of the Council for which they are bound to make compensation,” shall be ascertained in the manner prescribed by the Statute, excludes, by necessary implication, actions of indemnity for damage in respect of such acts. It is enough, therefore, to say that, in their view, the corporation, having acted within their powers, the plaintiff's claim (if sustainable at all) is of a kind which would fall to be determined by the Commissioners under the special Act.

It may be observed that the question of procedure in cases of this kind is not merely a technical one. This was pointed out in the judgment of this Committee in *Jones v. The Stanstead Railway Company*. It is there said: “The claim for damages in an action in this form assumes that the acts in respect of which they are claimed are unlawful, whilst the claim for compensation under the Railway Acts supposes that the acts are rightfully done under statutable authority; and this distinction is one of substance, for it affects not only the nature of the proceedings, but the tribunal to which recourse should be had.”

On the whole case, their Lordships find themselves unable to concur in the judgment pronounced by the majority of the Judges of the Court of Queen's Bench, and they will humbly advise Her Majesty to reverse both judgments below, and to direct that the action be dismissed with costs.

COSTS**ATTORNEY ACTING IN HIS OWN CAUSE.**GUGY v. BROWN¹

165. By the old French law prevailing in *Lower Canada*, an attorney acting as such in his own cause is entitled under a judgment in his favour, “*avec dépens*” upon taxation of costs, to the same fees as are allowed by the tariff to attorneys in all ordinary cases.

SIR EDWARD VAUGHAN WILLIAMS, p. 330:—The rule for deciding this question, as it was said by *LaFontaine, C. J.*, in *Brown v. Gagy*², must be furnished by reference to the French and to the English law, because the then existing French law was dominant in Lower Canada when it was conquered in 1759, and consequently that law

¹ L. C. R., 1867 Dec. 15, 1V Moore N. S. 315.

² See *action en dénonciation de nouvel œuvre*.

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continues to be dominant there, subject to any alterations which have been introduced by legislative acts, or other competent authority.

It is necessary, therefore, to inquire what the old French law was, with reference to this subject.

On behalf of the appellant several authorities were cited, the principal of which are, "*Le Parfait Procureur*" Ed. 1705; *Pigeau, Ferrière*, and *Serpillon*. These are for the most part stated in the appellant's case, and referred to by Mr. Justice *Taschereau* in 11 Lower Canada Reports, pp. 484-485. And their Lordships are of opinion, in accordance with the opinions of Mr. Justice *Meredith* and Mr. Justice *Taschereau*, that the passages cited from these books constitute a preponderance of authorities in the French law for allowing fees to an attorney who appears as such in his own case.

But it was argued for the respondent, that the old French law has, at all events, been displaced by modern authorities. It is certainly true that although in the case which is the subject of appeal, when in the Superior court of *Quebec*, Judge *Taschereau* adhered to the old French law, and decided the case accordingly in favour of the attorney's claim (11 Lower Canada Reports, 483), yet on three earlier occasions the Court of Queen's Bench decided the contrary, in disregard of that law, and held that an attorney conducting his own case is not entitled. Two of these cases were decided by a majority of three to two Judges in *Brown v. Gugg*¹, and *Gugg v. Ferguson*², and a third case of *Fournier v. Cannon* was cited by Mr. Justice *Meredith* in his judgment in the present case, in which he himself and all the other judges of the Queen's Bench appear to have concurred.

In the judgment now under appeal, Mr. Justice *Meredith*, although he thought it right to agree with the majority of the court, declared that his own contrary opinion (expressed in *Gugg v. Ferguson*) still remained unchanged; and Mr. Justice *Mondelet* agreed in that unchanged opinion, and differed from the other judges of the court.

Mr. Justice *Aylwin* appears to rest his judgment mainly on the argument that the tariff gives fees to attorneys only and thus in effect denies them to parties who are not attorneys, and that a person who appears in person cannot call himself an attorney. In answer to this it may be observed, that an attorney who conducts his own case, and described himself on the face of the proceedings not as a party suing or defending in person, but as attorney on record, accepts by that very act all the duties and responsibilities which the practice of the court imposes on attorneys acting for ordinary clients. Mr. Justice *Meredith* founds his judgment merely on the propriety of a judge's deferring to the authority of adjudged cases. Mr. Justice *Budgley*, in substance, takes the same view as Mr. Justice *Aylwin*, with the addition that he relies on the circumstance that in the case of an attorney appearing for himself, inasmuch as in the proceeding by way of "*inscription en faux*," the law re-

1 L. C. R. 401.

2 Ibid 409.

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quires a special procuration from the party to his attorney, as the foundation of the proceeding, there would be an absurdity in taking such a special power of attorney from a man to himself; and further, that the proceeding by way of "*distriction et dépens*" would not be practicable, because the occasion for it could never arise. But their Lordships are constrained to observe that they cannot understand how these are good reasons for disallowing to the attorney his fees for services performed in the cause as an attorney.

It will be observed that in no one of these judgments is there any dealing with the authorities cited in behalf of the appellant from the old French law books in favour of the attorney's right. The judges do not at all deny that there are such authorities, or attempt to distinguish them. Mr. Justice *Duval* alone, in his judgment in the earlier case of *Brown v. Gugg*, says that the opinion of *Serpillon* on this point is of little weight, being founded on faulty reasoning only, and quotes a passage from *Jousse*, as to the rights of *avocats*, as a conflicting authority. But Mr. Justice *Meredith* observed¹: "That authority (*Jousse*) is not applicable here in *Canada*, when advocates are also attorneys. It must be recollected that in *France* the right of action for fees was not only denied to advocates, but such as claimed them were struck from the Rolls." And this appears to be the only authority which has been cited on behalf of the respondent from the French law books in denial of the attorney's right to fees.

With respect to the argument founded on the tariff of fees, the Court of Queen's Bench of Lower Canada is authorized by several statutes to make and establish tariffs of fees for the counsel, advocates, and attorneys practising therein. But the object of such a tariff appears to us to be, not to confer fees on any one, or to deprive any one of them, but simply to fix the amount of them for particular services done by such officers. If at the time of making the tariff an attorney acting for himself in a cause was, according to the authorities cited by the appellant, entitled to such fees as would have been payable to another attorney acting on his behalf, it surely was not meant by the tariff to alter the law, and deprive him of such fees altogether, but merely to regulate the amount to be paid to him. On this point their Lordships concur with the view taken by Mr. Justice *Meredith* in *Gugg v. Ferguson*², where the learned judge says: "It is undeniable that the appellant is an attorney, and that he has performed certain services in this cause for which, when performed by an attorney, the tariff allows certain fees; and I really cannot see anything in the law or in reason, to prevent the appellant, an attorney, from receiving the fees usually incident to the services which he performed."

But it is intimated in the judgment of *LaFontaine, C. J.*, in *Brown v. Gugg*, and asserted in the judgment of Mr. Justice *Aylwin* in the present case, that the practice has been to disallow fees to attorneys conducting their own cases. And if this practice had been shown to

1 11 L. C. R. 412.

2 11 L. C. R. 418.

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be uniform and long established, it would certainly have gone far to prove that the old authorities were not to be relied on.

But there appears to be some mistake on this subject; for it is said by Mr. Justice *Meredith*, in *Guy v. Ferguson*¹: "The practice in this country may, I think, be said to be in favour of the attorney. The protonotary of the Superior court, an officer of great experience, informs us that in the time of Chief Justice Sewell fees in such cases were not allowed; but that in the time of Sir James Stuart the practice was to allow them; that the last mentioned practice has continued ever since; and he has given us a note of four cases in which attorneys appearing in their own cases have been allowed their fees. Under these circumstances I think it doubtful whether any change in the practice as to this matter ought to be made, and that if a change were determined on, it ought to be made so as not to affect pending causes."

Whether the Court of Queen's Bench might lawfully alter the law under the statutory power conferred by the Consolidated Statutes, c. 77, s. 15, to make and "establish such rules of practice as are requisite for regulating the due conduct of the causes, matters, and business before the said court," it is unnecessary to decide for the court has in fact made no such rule, nor has the law been altered by any legislative act, or other competent authority.

We, therefore, think it was the duty of the judges of the court to administer the old French law, and that they could not alter it, or decline to apply it, on grounds of supposed expediency, as they appear to have done in the judgment in the present case, and the preceding cases on which that judgment was founded. For these reasons, their Lordships, will advise Her Majesty that it should be reversed.

DISCRETIONARY WITH THE JUDICIAL COMMITTEE.**LINDO v. BARRETT²**

166. The costs upon a successful appeal, are discretionary with the Judicial Committee, they are allowed according to circumstances.

167. In a case of reversal, the Order in Council contained no direction as to costs. Upon petition by appellant for a supplementary Order allowing costs, the Judicial Committee refused to interfere.

168. To entitle an appellant to costs, application ought to be made at the hearing.

THE RIGHT HON. T. PEMBERTON LEIGH, p. 462:—Their Lordships will make no order upon this petition. The rule which has been referred to is merely a regulation describing the course of practice which is to form the guidance of the Lords of the Committee, in

¹ L. O. R. 418.

² Jamaica, 1856 Feb. 7, 1X Moore 456.

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giving or refusing costs. The effect of that rule is, that if the judgment of the Court below is reversed, the appellant is to have his costs, but then he must ask for those costs; and if he does not ask for them, the Order in Council is merely to reverse. Rule I, Order in Council, 13th June 1853.

IN CASE OF COLLISION BY ACCIDENT.THE "MARPESSIA" ¹

169. It is a rule in the Admiralty Court in cases where a collision is found to be the result of inevitable accident, to make no order as to costs, unless it can be shown that the suit was brought unreasonably and without sufficient *prima facie* grounds. The "London" ¹ Br. & L. 82.

SECURITY FOR See PRACTICE; *iusdem verbis*.

IN DISPUTED WILLS.ARMSTRONG V. HUDLESTON ²

170. The judgment of the court below granting probate of a will was affirmed, but the court below having condemned the contestant to costs, this part of the judgment was reformed, as the circumstances of the case warranted the proceedings against the will, and the costs were ordered to be paid out of the estate.

PRINSEP AND THE EAST INDIA COMPANY V. DYCE SOMBRE & AL. ³

171. The Judicial Committee confirmed the judgment of the court below on a question of unsoundness of a testator's mind, but reversed so much of it as related to costs which were put at the charge of the appellants, and directed the appellants' costs below and upon appeal to be paid out of the estate, as they were of opinion, that the appellants, as executor and legatees in trust, did right in bringing the case before this court; it being under the circumstances essential to the purposes of justice that the validity of the will and codicil should be submitted to judicial decision. But as they had prosecuted the case and appealed separately, they were allowed only one set of costs between themselves. With respect to the respondents, they were to take each their own costs out of their share of the property.

DIMES V. DIMES ⁴

172. Where the circumstances of the case are so doubtful as to require that a will should be established by legal

¹ Admiralty, 1872 Feb. 15, VIII Moore N. S. 469.

² Canterbury, 1837 Dec. 13, I Moore 478.

³ Canterbury, 1856 April 16, X Moore 232.

⁴ Canterbury, 1856 June 21, X Moore 422.

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proof, the party objecting to the legality ought not to be subjected to costs for instituting such an inquiry ; but after a full inquiry and after the will had been maintained in the court below, it was held that there was no sufficient ground to justify the appeal, and costs were decreed against the appellant.

SUCCESSFUL PARTY CONDEMNED TO**BARTHEM V. GODFREY ¹**

173. The appellant although successful, was condemned to pay the respondent's costs of appeal, on the ground that it appeared from the common understanding of both parties on the subject, that if objections had been made in the court below the alteration demanded might have been obtained from the court there.

The appellant, therefore, having had an opportunity to acquire, without appeal, that alteration which was given him upon appeal, their Lordships thought that he should support the whole costs.

TAXATION OF BILLS OF***In re MINGHIN* ²**

174. The courts will generally grant no other fees than those provided for by the tariff, but where reasonable fees not mentioned in a tariff are charged and a practice has grown up of charging them, it is the duty of the court to establish a legal authority under which they may be collected.

LORD LANGDALE, p. 53 : — We undoubtedly consider it to be the duty of those who preside over the courts and offices of justice, to use their utmost vigilance and endeavours, to prevent any extortion upon suitors, and to take care that every fee or sum of money, which is sought to be received by the officers and solicitors, has a legal sanction for its receipt, and that no more than the sum legally sanctioned should be received ; but in almost every court it has happened that, in the progress of time, and unnoticed by the court, the practice of receiving sums not legally sanctioned but which in themselves are reasonable, and would have been sanctioned if duly noticed, has grown up, together with the practice of receiving sums which are both illegal and unreasonable, and which would have been forbidden if duly noticed. Such practice having been followed by one officer after another, who succeeded his immediate predecessor, becomes at length, in the absence of any reference to a duly established title, a sort of evidence of right, or supposed right, and the office is inno-

¹ Jersey, 1830, 1 Knapp 381.

² Madras, 1847Feb. 13, XI Moore 53.

TAXATION OF BILLS OF

cently accepted upon the notion, and on the reliance, that the right was established, by the usage which has been acquiesced in, and prevailed under the allocation of the judges.

When a practice of this sort comes under observation, it is the duty of the court to exercise, or procure the exercise of a legal authority to retrench fees, if not legal and reasonable, and to establish fees which may be reasonable and just though not legal, until duly sanctioned. But in consideration of such circumstances, it ought to be carefully observed, that an officer, who, following the steps of his predecessor, may have received fees, which ought not to have been allowed, or continued, may, nevertheless, not be justly chargeable with any corruption or moral guilt. *See v^o PRACTICE.*

COURTS OF JUSTICE

JUDGMENTS. *See* INTERNATIONAL LAW: *eadem verbo.*

JURISDICTION. *See* INTERNATIONAL LAW, JURISDICTION.

POWER TO CREATE

In re THE LORD BISHOP OF NATAL ¹

175. Courts of justice cannot be created by any other power than parliament.

LORD CHELMSFORD, p. 152: — It is a settled constitutional principle or rule of law, that although the crown may by its Prerogative establish courts to proceed according to the common laws, yet that it cannot create any new court to administer any other law; and it is laid down by Lord Coke in the 4th Institute, that the erection of a new court with a new jurisdiction cannot be without an Act of Parliament.

ROYAL COURT AT GUERNSEY.

In re THE BAILIFF AND JURATS OF THE ROYAL COURT
AT GUERNSEY ²

176. The respective rights of the Royal Court in Guernsey and of the Governor of the Island are described in their Lordships' judgment as follows: *First*, the bailiff and jurats of the Royal Court are individually entitled to take part, and speak, in all conferences with the Governor, but the time and place for such conferences are fixed by the Governor. *Second*, a writ of pardon addressed to the Governor, does not require to be verified and registered by the Royal Court. *Third*, if the *portier* of the gaol refuse to deliver the prisoner, the Governor cannot enforce the writ of pardon by the

¹ Natal, 1884 Dec. 18, III N. S. 115.

² Guernsey, 1844 Dec. 20, V Moore 49.

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threat of military or other force. *Fourth*, the Governor can exercise, without the advice of the Royal Court, the power of deportation of aliens in the Island.

CREDITORS**COMPOSITION.****EXCHANGE BANK OF YARMOUTH V. BLETHEN ¹**

177. A firm being unable to pay their creditors in full, assigned all their estate and effects to a trustee, for the benefit of their creditors, and effected a deed of composition on condition of full discharge. The appellants signed the deed, but made a memorandum to the effect that they executed the deed only in respect of certain claims mentioned in it; subsequently they received a sum of money from the trustee under the deed of composition.

The appellants were held bound by the deed, as the note appended to the appellants' execution of the deed, did not amount to a non execution or a refusal to execute any part of it. It was at least capable of being interpreted as descriptive of the amount of debt which the plaintiff intended to claim, being considerably more than that which was set opposite to their name in the deed, coupled with an intimation that they did not mean to claim more, and in this view it would not amount to a non-execution of the deed.

178. It is not every attempt by a form of execution to restrain the full operation of a deed which can be treated as a non-execution of it. *Tyson v. Dan 6 Wharton 256.*

RIGHT OF**MARTIN V. BOULANGER ²**

179. Creditors are bound by the acts of their debtor with third parties; and they cannot get them set aside except by alleging and proving fraud and collusion.

LORD BLACKBURN, p. 301: — The court goes on to say: "The parties to that suit were therefore the plaintiff Robert and the defendant Martin, plus the intervening parties just mentioned. They were the parties who appeared before the arbitrators and umpire, and were heard by them. Whatever was decided by the arbitrators, and finally affirmed by the umpire, and subsequently by the court, can apply to and be binding on no one but the parties to the reference." It certainly seems to their Lordships that this is not quite accurate. What was found on the reference is binding, not only on the parties to the reference, but also on every one who would, in English law, by claiming through or under them, be privy to it.

¹ Nova Scotia, 1885 Feb. 17, L. R. X Appeal Cases 293.

² Mauritius, 1883 Feb. 21, L. R. VIII Appeal Cases 296.

RIGHT OF

The same thing seems to be the law in France, and in truth the law must be in every country the same. It is not merely that a judgment shall be binding on the parties who are the actual parties to the suit, but it must be binding upon all who claim under or through the party to it in respect to the property in dispute, otherwise there would be interminable litigation, and every judgment would be opened again and again, and the maxim "*interest reipublicæ ut sit finis litium*." to say nothing of justice and convenience between parties, would be completely lost sight of.

CRIMINAL LAW

APPEAL IN See **APPEAL**: *codem verbo*.

ASSAULT.

ATTORNEY GENERAL OF N. S. WALES V. MACPHERSON ¹

180. A member of the Legislative Assembly of New South Wales having committed an assault on a member within the precincts of the House, while the Assembly was sitting, the Attorney General laid an information against the assaulting member alleging that the assault was in contempt of the said Assembly. A general demurrer was made against the information and was allowed by the Supreme Court.

The Judicial Committee, reversing this judgment, held, that the information was good, as the alleged contempt of the Legislative Assembly was charged only as a matter of aggravation, and could be rejected as surplusage, and the information was sustainable for an assault.

CONSTRUCTION OF NOTICE.

THE QUEEN V. PRICE ²

181. The word "forthwith" in a notice to a party, charged criminally and out on bail, to appear on pain of forfeiting his recognizance, means within a reasonable time from the service, and not from the date of the notice.

CRIMINAL PROSECUTION DOES NOT DEPRIVE OF CIVIL RECOURSE FOR DAMAGES. See **INTERNATIONAL LAW**: *breach of blockade*.

EVIDENCE READ TO JURY

REGINA V. BERTRAND ³

182. A jury not having agreed in a trial for felony were discharged. A fresh trial was had, at the same sittings, before another jury. Some of the witnesses having been

¹ New South Wales, VII Moore N. S. 49.

² Ceylon, 1854 Feb. 17, VII Moore 204.

³ New South Wales, 1867 June 28, IV Moore N. S. 460.

EVIDENCE READ TO JURY.

re-sworn, the evidence given by them at the first trial was read over to them from the judge's notes, liberty being given both to the prosecution and to the prisoner to examine and cross-examine. The Supreme Court under the circumstances granted a new trial.

The Judicial Committee held that the course adopted by the judge, at the new trial, was irregular and could not be cured even by the consent of the prisoner; and that according to the English criminal law, the court has no power to grant a new trial in a case of felony. The prisoner was discharged.

SIR JOHN P. COLERIDGE, p. 481:—The evidence in this case, taken in the usual way on the former trial, had occupied nearly three days. Those of their Lordships who have been used, on motions for new trials, to hear the judge's notes of the evidence read, probably know well by experience how difficult it is to sustain the attention, or collect the value of particular parts, when that evidence is long; and one cannot but feel how much more this difficulty must press upon twelve men of the ordinary rank, intelligence, and experience of common jurymen. But this is far from all. The most careful notes must often fail to convey the evidence fully in some of its most important elements, those for which the open oral examination of the witness in presence of prisoner, judge and jury, is so justly prized. It cannot give the look or manner of the witness; his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner, when that has been important, upon the statement of anything of particular moment; nor could the judge properly take on him to supply any of these defects; which, indeed, will not necessarily be the same on both trials; it is, in short, or it may be, the dead body of the evidence, without its spirit; which is supplied, when given openly and orally, by the ear and eye of those who receive it.

IGNORANCE.**SHERWILL V. THE KING ¹**

183. To render a party liable to the penalties provided by a prohibitory statute, it must be well proved that he committed the prohibited act himself, or that he had a guilty knowledge of the act being done by those under his control.

LORD WYNFORD, p. 12:—The counsel for the Crown has said: Is ignorance to be any excuse? Indeed ignorance is an excuse; not wilful ignorance, if it can be shown to be such; but ignorance is an excuse and must be because by the words of the statute unless there is knowledge there can be no guilt, and where there is complete

¹ Gibraltar, 1836 July 11, 11 Moore 1.

IGNORANCE.

ignorance there certainly is not that knowledge which would be required to convict. I do not mean to say that it is necessary that you should have express evidence of knowledge, knowledge may be inferred in this and in every other case.

JURY DE MEDIETATE LINGUÆ.

LEVINGER V. REGINA¹

184. The English juries Act of 1865, sect. 37, gives to the prisoner a right of peremptory challenge to the extent of twenty, on trial or inquest taken before any court, wherein the Crown is a party.

It was held that this right has not been taken away by the 38th section of the same Act which provides in the case of aliens, for a jury *de medietate linguæ*; and though the composition of such jury is prescribed by statute, the incidents of the trial are governed by the Common Law, and are implied and included therein.

185. Held also that an alien prisoner has the right to challenge alien jurors to the extent of twenty in number.

SIR JOSEPH NAPIER, p. 75:—The rule of the common law, as it has been modified by the 27th section of the Victoria statute provides that every person arraigned for treason, felony or misdemeanour shall be admitted to challenge peremptorily to the number of twenty jurors (Juries Statute, 1865, No. 272).

The right of peremptory challenge at common law was a principal incident of the trial of felony. When Sir E. Coke comments upon the 33rd *Hen. 8*, c. 23, which for a time took away the right of peremptory challenge in cases of high treason, he says, "the end of challenge is to have an indifferent trial, and which is required by law, and to bar the party indicted of his lawful challenge is to bar him of a principal matter concerning his trial" (3 Inst. 27). In *Mansell vs Reg.*² Lord Campbell, C. J., observes that, "unless this power were given under certain restrictions to both sides, it is quite obvious that justice could not be satisfactorily administered; for it must often happen that a juror is returned on the panel who does not stand indifferent, and who is not fit to serve upon the trial, although no legal evidence could be adduced to prove his unfitness."

P. 80:—It was not necessary to draw any distinction between the alien and the denizen moiety of the jury with reference to the law of peremptory challenge, the reason for which applied to both; but it was necessary to distinguish with reference to challenges for cause, for want of property qualification, and to make special provision, as to these for the case of alien jurors on a jury *de medietate*. The words of the section relate to challenges for cause only, and are

¹ Victoria, 1870 July 25, VII Moore N. S. 68.

² E. & B. 71.

JURY DE NEDINETATE LINGUE.

in the affirmative; so that the right of peremptory challenge is not in any way prejudiced.

LEGISLATION ON See **LEGISLATURE**: *legislative powers*: *iusdem verbis*.

NEW TRIAL.

REGINA V. BERTRAND ¹

186. Held, that according to the English law no court can grant a new trial in a case of felony.

PENAL SERVITUDE.

THE QUEEN V. MOUNT ²

187. The word "kept" implies detention, and "penal servitude" compulsory labour.

188. When the law of England abolished transportation, and substituted for it penal servitude, the latter became a sentence which might be lawfully passed by the colonial courts, when acting under their admiralty criminal jurisdiction.

189. A sentence of penal servitude is not null, because no means had previously been provided for carrying it into effect.

190. A prisoner who had been convicted of felony ought not to be set at large during the term of his sentence, until it is clear that no lawful means of executing it could be found. *Ex-parte Krans*, 1 B. & C. 258; *Parker's case*, 5 M. & W. 32.

ONUS PROBANDI IN See **EVIDENCE**: *iusdem verbis*.

PERJURY. See **EVIDENCE**: *eodem verbo*.

PRISONER'S DEPOSITION. See **EVIDENCE**: *iusdem verbis*.

PUNISHMENT OF CRIMES. See **INTERNATIONAL LAW**: *iusdem verbis*.

SUICIDE IN INDIA. See **INTERNATIONAL LAW**: *English law in British colonies*.

SUSPICIONS. See **EVIDENCE**: *eodem verbo*.

VENIRE DE NOVO.

REGINA V. MURPHY ³

191. The power of the Supreme Court of New South Wales to grant new trials does not extend to cases of felony; and

¹ New South Wales, 1867 June 28, IV Moore N. S. 461.

² Victoria, 1875 March 16, L. R. VI P. C. 283.

³ N. S. Wales, 1869 June 22, VI Moore N. S. 178.

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a *Venire de novo* cannot be awarded after verdict upon a charge of felony tried upon a good indictment and by a competent tribunal.

SIR WILLIAM ERLE, p. 196:—The cases in which a verdict upon a charge of felony has been held to be a nullity, and a *Venire de novo* awarded have not been classified in the Digests; there are cases of defect of jurisdiction in respect of time, place, or person, cases of verdicts so insufficiently expressed or so ambiguous that a judgment could not be founded thereon; but we have not discovered any valid authority for holding a verdict of conviction or acquittal in a case of felony delivered by a competent jury before a competent tribunal in due form of law to be a nullity by reason of some conduct on the part of the jury which the Court considers unsatisfactory.

THE ATTORNEY GENERAL FOR NEW SOUTH WALES V. MURPHY¹

192. A *Venire de novo* vacating the judgment upon the verdict is substantially an attempt to grant a new trial, and is invalid, as there is no new trial in cases of felony. The only cases where a *Venire de novo* has been granted upon a charge of felony, have been cases of want of jurisdiction, or of impossibility to render a sentence on account of the ambiguity of the verdict. The only recourse of the prisoner is by application to the Executive for the commutation of the sentence if the case allowed such a grace.

SIR W. ERLE, p. 601:—Upon this appeal it appears by the proceedings returned to this court that the prisoner Murphy was tried for murder at a session of Oyer and Terminer and gaol delivery for the month of September, before Mr. Justice Pauncett, and was convicted and sentenced; and all the proceedings as far as appeared, were regular in due form of law. Afterwards, an application on behalf of the prisoner upon an affidavit was made to the Supreme Court sitting *in banco*, in term, for a rule to show cause why a *venire de novo* should not issue for the trial of the said prisoner, and upon further affidavits, the said rule was made absolute, and therein it was also ordered that a suggestion should be made on the record to the effect that after the jury had been empannelled, and before verdict, the jurors were allowed during certain adjournments of the court for the night, by the officers of the sheriff having charge of them, to have access to and free perusal of certain newspapers containing reports of the evidence from day to day; and that the last mentioned that, by reason of the matters so suggested, was not according to law, but was irregular and void. This suggestion was followed by an entry, purporting to be an order that, for the cause aforesaid, the judgment on the said verdict be vacated, and that the sheriff cause a jury anew to come.

It further appears by the same proceedings above referred to that

¹ New South Wales, 1870 July 17, XXI Law Times N. S. 598.

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the only affidavit giving judicial knowledge to the Supreme Court of the alleged irregularity in keeping the jurors was that of the attorney for the prisoner, who deposed "that he was informed by one of the jurors who acted on the said trial, and he verily believed that after they had been empanelled to try the said case, and during their confinement at the hotel (where they were kept during adjournments), and before verdict, the jurors were allowed the free use of the newspapers of the day which contained reports of the aforesaid trial, as far as it had gone, in one of which newspapers the heading given was the "*South Greek Murder Case*." These are the proceedings in the courts below to which we think it necessary to advert as relevant to this appeal. Upon the argument in this court the question has been whether the above mentioned order for vacating the judgment upon the verdict and for *venire de novo* in order for another trial was valid and their Lordships have come to the conclusion that the answer should be in the negative, both on the ground which their Lordships relied upon in the case of *Reg. v. Bertrand*, 16 *L. T. Rep. N. S.*, 752; *L. Rep.*, 6 *P. C.*, 520, and also on the further ground stated below. 1st. Their Lordships consider that the present case is in substance an attempt, by the exercise of a discretion to grant a new trial on the ground that the conviction was considered to be unsatisfactory by reason of some irregularity in the conduct of the trial. In *Bertrand's* case the irregularity was, that the evidence of the witnesses was read to the jury from the notes of the evidence on a former trial. Here the irregularity was in so keeping the jury during the course of the trial, as that the jurymen may have had access to some newspapers during that time; but the law is clear that the discretionary power vested in certain courts and cases to grant new trials does not extend to cases of felony. The law on this subject was declared by their Lordships in that case and we consider that the law so declared governs the present case. Each of these cases falls within the rule that no person ought to be put in peril twice on the same charge. The application of the rule is shown in detail by *Blackburn J.*, in *R. v. Winsor*, *L. Rep. 1 Q. B.* 313; 14 *L. T. Rep. N. S.* 195, who there states: "When the jury have been brought together and the prisoner has been given in charge and the trial has commenced, the right course, if practicable, is that the jury should give their verdict convicting or acquitting the prisoner. When the jury have once found a verdict of conviction or acquittal, the matter has become *res judicata*, and after that there can be no further trial." He further shows that a *venire de novo* on new indictment would be erroneous, and a new indictment on the same charge would be defeated by a plea of *autrefois acquit* or *convict*. These remarks relate to a verdict returned upon a good indictment for felony before a competent tribunal. Their Lordships cite this statement of the law to show the finality of a verdict upon a charge of felony when the indictment is good, and the prisoner has been given in charge to a jury in due form of law empanelled, chosen and sworn, and a verdict of conviction or acquittal has been returned. In the present case, if the prisoner should have been tried and convicted upon the *venire de novo* ordered to issue by the rule here

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appealed against, according to the passage just cited, a judgment thereon would be erroneous. The cases in which a verdict upon a charge of felony has been held to be a nullity and a *venire de novo* awarded have not been classified in the Digest; there are cases of defect of jurisdiction in respect of time, place, or person, cases of verdicts so insufficiently expressed or so ambiguous that a judgment could not be founded thereon; but we have not discovered any valid authority for holding a verdict of conviction or acquittal in a case of felony delivered by a competent jury before a competent tribunal in due form of law to be a nullity by reason of some conduct on the part of the jury which the court considers unsatisfactory. As to the two supposed exceptions to this rule against new trial in cases of felony, *R. v. Scaife*, *Q. B.* 238, was noticed in *R. v. Bertrand*, and the other case of *R. v. Fowler and Johnson*, 4 *Barn. & Ald.*, was explained to be no decision in the course of the argument on this appeal. Secondly, the further grounds for sustaining the present appeal beyond those expressed in the judgment in *Bertrand's* case relate both to the form of the proceeding in the Supreme Court when exercising appellate jurisdiction under which the rule appealed against was granted, and also to the sufficiency of the evidence on which that court acted in granting the rule. Their Lordships are not aware of any principle either of the law of England or of this colony by virtue whereof the Supreme court, sitting *in banco* in term, could take cognisance as a Court of appeal, of the judgment pronounced by *Faucett, J.*, at the session of *Oyer and Terminer*, which had come to an end before the session *in banco* began; and although the relation of the courts to each other in respect of appellate jurisdiction has not been ascertained by us with precision, still, whatever be that relation, we find no form of proceeding analogous to that which is required by the common law in proceedings when the aid of a court of error or appeal is invoked, but the form is the form adapted to an application to the discretion of the court for a new trial. Then as to the sufficiency of the evidence of the facts on which the court acted in granting the rule appealed against, their Lordships do not find any strictly legal evidence of any fact, they find nothing beyond an affidavit of mere hearsay information obtained from a person who had been on the jury, but was then discharged; and this information, showed possible access to newspapers, without showing that they contained matter which tended to influence the jury improperly, or that the jury ever did, as a matter of fact read the newspapers. There is also the further objection that the supposed informant had been one of the jurymen, and the courts have at times expressed a reluctance which we consider salutary against receiving the separate statements of any of the individuals who had in combination formed a jury, in order to impeach the verdict. The whole of the proceedings in the Supreme court are referred to the Judicial Committee, and as their Lordships consider that the rule *nisi* for a new trial, and the rule absolute founded thereon, were each granted on insufficient grounds, both rules fail to produce any effect, and the conviction stands unimpeached thereby. We do not examine the authorities cited for the

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respondent because none of them appear to us to sanction the notion that a verdict, even in a civil case, could be set aside upon an imagination of some wrong without any proof of reality. The suggestions upon which verdicts have been so set aside in civil cases have alleged traversable facts, material and relevant, to show that the verdict had actually resulted from improper influence, and refer to the special verdict reported in 11 H. 4, f. 17, as affording an example of such facts as would, if stated in a suggestion on the record, have had the effect of setting aside the verdict. The case in the *Year Book*, 11 H., 4, f. 17, we translate as follows: "The plaintiff in an assize had delivered an escrowment (writing to be used in case of need) to juryman on the pannell for evidence of his matter; and after the same juror, with others, had been sworn, and put into a house to agree on their verdict, he showed the writing to his companions, and the officer who kept the inquest showed this matter to the court, through which the justices took the writing from the jurors, and took their verdict; and by the examining (*"per l'apposail"*) of the jurors the time of the delivery of the writing was inquired into, and it was found (i. e., by the jurors) as above stated; and as the verdict was for the plaintiff, now he prayed judgment. *Gascoigne* and *Hull* said that the jury, after that they were sworn, ought not to see or carry with them any evidence, except that which was delivered to them by the court, and by the party put in court as the evidence shown; and inasmuch as they did the contrary, the plaintiff ought not to have judgment." This case, with the words of *Gascoigne* and *Hull*, has been frequently referred to in abridgments and treatises by *Brooke*, *Rolle*, *Hale*, *Viner*, and others; but the general words of those judges, as well as of judges in general, are to be limited in some degree by reference to the facts of the case in respect of which they were spoken, and the issue of this case is not altered by transcription. We take one reference to this case, as an example, from *Bro. Ab. "Gen. Issue,"* p. 85, thus:—"After stating that an inquest must not take evidence privily, he adds: "Et par *Gascoigne* et *Hull* ils preignent escrowe extra curiam et passent pur le plaintiff, si ceo appiert sur examination par le court, ceo est cause d'arrêter le jugement." (11 H. 4, 17.) So that the result of the examination, viz., that the verdict was not "according to the evidence," but upon evidence taken out of court from one party without the assent of the other appeared by the finding of the jury, and was upon the record, as *Brooke* understands the case, or the judgment could not have been arrested.

The special verdict here reported, may be contrasted with the suggestion in the present case. In the case 11 H. 4, 17, the court which had jurisdiction both to try the suit and to arrest the judgment ascertained the fact of the misconduct of the plaintiff by examining the jurors, while acting as jurors, and by their verdict. Judicial knowledge from this source is in contrast with the affidavit above described. Also the interest of a plaintiff as a party may be contrasted with the supposed interest of the Queen referred to in the judgment of the Chief justice in the court below in an indictment in which, although it runs in her name, she has no interest

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beyond that of truth and right. Neither is the sheriff her agent, as also there suggested; he emanates from the people, and is neither appointed by nor can be dismissed by, nor is he paid by the Queen; furthermore, the mere omission of his bailiffs to clear a room in an inn where jurors are confined, of the newspapers coming there by the course of the inn, is in contrast with the culpable craft of the plaintiff who prepared a statement of his case, and sought out a juryman into whom he probably infused a prejudice in his favour, and influenced the verdict. In conclusion their Lordships desire to add that they are sensible of the importance of guarding the channels for information through which the minds of the jury are led to their verdict and concur with the learned judges of the court below in their zeal for the prevention of any such misconduct in future; but they think that the court was wrong in granting a new trial as a remedy for this misconduct, and that the mischief would be greater if uncertainty was introduced respecting the course to be pursued in administering the law relating to charges of felony. If irregularity occurs in the conduct of a trial not constituting a ground for treating the verdict as a nullity, the remedy to prevent a failure of justice is by application to the authority with whom rests the discretion either of executing the law or commuting the sentence. As there was, in the opinion of the court below, irregularity in the trial of the respondent sufficient to vacate the judgment, their Lordships have no doubt that, upon proper application on behalf of the respondent, which they recommend to be made, such weight will be given to these remarks as they may appear to deserve. But, as between the appellant and respondent, their Lordships will advise her Majesty that the appeal should be sustained without costs, and that the orders for a new trial should be reversed.

CROWN

PRIVILEGE OF THE See **PRIVILEGE** : *iusdem verbis*.

RESPONSIBILITY OF THE See **PUBLIC OFFICERS** : *iusdem verbis*.

VAN ROOYEN V. VANDER REIT¹

198. A land surveyor, represented in this suit by his executrix, was engaged to survey the government's lands, on condition that he was to be paid by the treasurer of the district, out of the money paid by the persons applying for grants of land, who were to deposit their amount with the district secretary. By an arrangement with the secretary, this latter received the fees from the applicants and paid them over from time to time to the surveyor, without bringing them into the government accounts, and this went on during four years. In the fourth year, the secretary became

¹ Cape of Good Hope, 1838 Feb. 14, 11 Moore 177.

RIGHT TO SUE THE

insolvent having received large sums of money for the surveyor, who could not recover the amount.

On a suit against the government, it was held that by the arrangement between the surveyor and the secretary, the government was discharged of all responsibility; as the secretary, as a public officer, could not enter in such an agreement, and must have acted in his individual capacity.

RIGHT TO SUE THE**HETTHEMAGE SIMAN APPU v. THE QUEEN'S ADVOCATE**¹

194. In Ceylon there is no Petition of right, but according to usage and long practice the Crown may be sued, like the subject, by direct action or by cross-action. *The Duke of Brunswick v. King of Hanover*, 6 Beav. 1; *The Stoomvaast Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Company*, 7 App. Cas. 795.

FARNELL v. BOWMAN²

195. Under the statute 39 Vict., No. 38, the government of New South Wales may be sued in an action of damages, when their servants have destroyed grass, trees and fences belonging to a citizen.

CROWN LANDS**CERTIFICATE.****WINTER v. ATTORNEY GENERAL OF VICTORIA**³

196. Three appeals were heard together on the construction of the Land Act of 1869. The point decided is that the government has the right to demand from a lessee occupying public lands, before giving him a grant of his allotment, a certificate from the Board of Land and Works that he has fulfilled all the conditions of his lease, only when the lessee has incurred any penalty.

FORFEITURE.**ATTORNEY GENERAL OF VICTORIA v. ETTERSHANK**⁴

197. There is relief in a Court of Equity against forfeiture, by non payment of rent, where the lessee continues in possession; the remedy is for specific performance.

198. When a tenant has forfeited his lease of Crown lands by not paying his rent, the issuing of a subsequent lease to

¹ Ceylon, 1884 April 7, L. R. IX Appeal Cases 571.

² New South Wales, 1887 July 23rd, LVII Law Times N. S. 318

³ Victoria, 1875 June 22, L. R. VI P. C. 378.

⁴ Victoria, 1875 June 22, L. R. VI P. C. 354.

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him or his representatives operates as a waiver of the previous forfeitures.

DAVENPORT V. THE QUEEN ¹

199. Under the several statutes regulating the occupation of public lands in Queensland, the occupation is allowed on payment of a rental and under certain conditions, one of them being the cultivation of one-sixth of the land during the year.

The appellant who had rented a parcel of land for eight years had not complied with this condition; however, the government received the rent during eight years, knowing that he had not cultivated the land as covenanted, and without any other protest than a notification which appeared in the *Gazette*, two years before stating that, in such cases, "the rent would be received conditionally and without prejudice to the right of the government." The lease having been declared forfeited in the court below, the Judicial Committee reversed the judgment and held that although the lease might have been voidable, the forfeiture was waived by the receipt of the rent; the protest was held not sufficient.

SMITH V. THE QUEEN ²

200. When the law concerning Crown lands requires that "all questions shall be decided by the Commissioner, who shall give his decision in open court" as in the *Crown Lands alienation Act of 1868* (31 Vict. No 46), the provision applies as well to forfeiture as to grant, and the commissioner is obliged to produce in open court the evidence upon which the forfeiture is pronounced.

Per Curiam, p. 235:—Their Lordships are of opinion that the inquiry to be made by the commissioners under sect. 51, sub sect. 5, is in the nature of a judicial inquiry. They do not desire to be understood as laying it down that the commissioner, in conducting such an inquiry, is bound by technical rules relating to the admission of evidence, or by any form of procedure, provided the inquiry is conducted according to the requirements of substantial justice. These requirements are well known to our law, and have been enunciated in many cases bearing some resemblance to, though not identical with the present. Where a statute enabled a bishop, if it should appear to his satisfaction, either of his own knowledge, or upon proof by affidavit, that (for various causes) the ecclesiastical duties of a benefice were negligently performed, to require the vicar to nominate a stipendiary curate and the bishop made a requisition to

¹ Queensland, 1877 Dec. 10, L. R. III Appeal Cases 115.

² Queensland, 1878 March 12, XXXVIII Law Times N. S. 233.

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this effect on the vicar founded on his own knowledge, without hearing the vicar, the Court of Common Pleas held the requisition bad. Lord *Lindhurst*, in giving judgment, thus expresses himself: "Does not this (the statute) import inquiry, and a judgment as the result of that inquiry? He is to form his judgment; it is to appear to him from affidavit laid before him; but is it possible to be said that it is to appear to him, and that he is to form his judgment from affidavits laid before him on the one side, without hearing the other party against whom the charge of negligence is preferred, which is to affect him in his character and his property? that he is to come to that conclusion without giving the party an opportunity of meeting the affidavits by contrary affidavits, and without being heard in his own defence?" *Bayley, J.*, in the course of his judgment, also observed: "Is it not a common principle in every case which has in itself the character of a judicial proceeding, that the party against whom the judgment is to operate shall have an opportunity of being heard?" (*Capel v. Child* 2 Cr. & Jer. 558). The same view of the law was expressed by Lord *Campbell*, who quoted the maxim, *Qui statuit aliquid, parte inaudita altera, æquum licet statuerit, æquis non fuit*, in *Reg. v. The Archbishop of Canterbury* (1 E. & E. 545). The same doctrine only varied in expression has been again and again applied to the conduct of trustees in deciding on the dismissal of schoolmasters. See *Philippe's Charity* 9 Jur. 959; *The Fremington School* 10 Jur 512. This doctrine, is, indeed carried somewhat further in *Cooper v. The Board of Works for the Wandsworth District*, 14 C. B. N. S. 180; 8 L. T. Rep. N. S. 278 wherein it was held, that although the *Metropolis Local Management Act* empowered the district board to alter and demolish a house, where the builder had neglected to give notice of his intention to build, seven days before proceeding to lay or dig the foundation, the board were nevertheless unable to execute that power without first giving, the person guilty of the omission an opportunity of being heard. *Erle, C. J.*, in his judgment, extends the principle somewhat beyond proceedings strictly judicial. He observes: "I fully agree that the legislature intended to give the district board very large powers indeed, but the qualification I speak of has been recognized to the full extent. It has been said that the principle that no man will be deprived of his property without an opportunity of being heard is limited to a judicial proceeding. I do not quite agree to that. The law I think has been applied to many exercises of power, which in common understanding would be not at all more judicial proceedings than would be the act of the district board in ordering the house to be pulled down." Assuming the contention of the Crown to be correct, that in such a case as this it would be enough that the commissioner should be satisfied of abandonment alone, residence being put out of the question, their Lordships would be disposed to say that there does not appear to have been a finding of the commissioner of abandonment apart from non residence. But they decide the case upon broader grounds. It appears to them that the defendant has not been heard in the sense in which "a hearing" has been used in the cases which have been quoted or in many others and in the sense re-

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quired by the elementary principles of natural justice. The commissioner doubtless acted with perfect good faith, but apparently without being aware that he was performing a judicial function, or even a function of a judicial nature. He has not stated upon what evidence he formed his opinion, whether written or *ex ad voce*, neither direct or hearsay. He refuses to furnish the solicitor of the defendant with any note or memorandum of that evidence, to give him any information as to who the witnesses against his client were or even what was the general character of their evidence. The defendant could not answer or explain testimony of which he was kept in ignorance, and therefore was not heard in his defence in any proper sense of that term. It is time that he was summoned to answer general charges of non-evidence and abandonment, but a summons to answer charges, the evidence in support of which is withheld, appears to their Lordships illusory. Their Lordships are for these reasons of opinion that the Crown failed to establish that there was such a hearing in this case as would enable the Crown to assert that it was proved to the satisfaction of the commissioner within the meaning of the Act that the defendant had abandoned his selection, or had failed in regard to the performance of the conditions of residence, and that consequently the governor had no jurisdiction to issue that proclamation of forfeiture.

GRANT OF See POSSESSION: *iusdem verbis*.

GRANT TO MINORS.

O'SHANASEY V. JOACHIM¹

201. When a statute allow the governor to make grant of public lands to "any person," it does not necessarily exclude minors. *Emery v. Barclay*, 8 S. C. Rep. 374; *Drinkwater v. Arthur*, 10 S. C. Rep. 193 were overruled.

INDIAN LANDS. See LEGISLATURE: *legislative powers: iusdem verbis*.

LOCATION TICKET. See INJUNCTION: *possession of Crown lands*.

MINER'S RIGHTS.

HOLLYMAN V. NOONAN²

202. Under the *Gold Fields Act* of 1866, the holder of a miner's right must, during the continuance of such right, be deemed to be the owner of the claim occupied by him, and all gold in and upon such claim must be deemed to be the absolute property of such owner.

203. Under the regulations of 1866, an ordinary quartz claim did not vest in the holder the right to all gold or quartz beneath the surface area of the claim.

¹ New South Wales, 1876 Feb. 5, L. R. I Appeal Cases 82.

² Queensland, 1876 April 7, L. R. I Appeal Cases 395.

OBSTRUCTION BY THE CROWN.ATTORNEY GENERAL OF THE STRAITS SETTLEMENTS V. WEMYSS ¹

204. The respondent was the lessee of a flat of land acquired by grant from the Crown. The land was bounded by the sea. The government executed some works upon the foreshore in front of it. Hence, the action in damages against the government by Petition of right for \$40,000. The judgment of the court below granting \$35,000 was confirmed. *Lyon v. Fishmongers' Company*, 1 App. Cas. 662; *Farrell v. Bowman*, 12 App. Cas. 648, 647.

POSSESSION OF See INJUNCTION: *eodem verbo*.**PRECIOUS METALS.**BALLACORKISH SILVER, LEAD AND COPPER CO. V. HARRISON ²

205. The precious metals in public lands granted to tenants in the Isle of Man belong to the Crown. *Act of Tynwald* 1703.

206. The Crown is possessed of the mines as of its own original title in the soil, and, as a consequence, it has all the rights incidental to that ownership, and among others the right to the use of all matters found thereon and percolating by natural processes into the mines when opened. It may apply and use waters in any way, remove them and cast them away. A person interfering with the exercise of these rights by a lessee of the Crown is liable in damages.

WOOLLEY V. ATTORNEY GENERAL OF VICTORIA ³

207. According to the true construction of 5 and 6 Vict., ch. 36, and 18 and 19 Vict., ch. 5, mines of gold and silver will not pass by a grant from the Crown without express words granting them.

WEBB V. GIDDY AND *vice versa* ⁴

208. Whatever may be the right of the Crown to the precious metals in a land granted in perpetual quit-rent, it is too late for the Crown to claim the exclusive right to them, after the government has made an agreement with the tenant that the latter and the government would share the licence money for defraying the expenses of superintending the digging of mines on said land.

¹ Straits Settlements, 1888 Feb. 4, L. R. XIII Appeal Cases 192.

² Isle of Man, 1873 Dec. 19, L. R. V. P. C. 49.

³ Victoria, 1877 Feb. 6, L. R. II Appeal Cases 163.

⁴ South Africa, 1878 July 12, L. R. III Appeal Cases 908.

PRECIOUS METALS.

ATTORNEY GENERAL FOR THE ISLE OF MAN V. MYLCHREEST ¹

209. The reserve in favour of the Crown, in the *Act of settlement*, in the Isle of Man, of all the "minerals" in public lands and customary estates, does not include "clay and sand," which, by the law and customs of the Isle, belong to the owners, *Hamner v. Chance*, 48 J. and S. 626; *Marquis of Salisbury v. Gladstone*, 6 H. and N. 123; 9 H. L. C. 692; *Earl of Rosse v. Wainman*, 14 M. and W. 859; *Darrill v. Roper*, 3 Drew 294; *Bell v. Wilson*, Law Rep. 1, Ch. Ap. 303; *Hent v. Gill*, Law Rep. 7, Ch. Ap. 699.

See LEGISLATURE: legislative powers: *iisdem verbis*.

PRICE.

BLACKMORE V. NORTH AUSTRALIAN CO. ²

210. When a government, under the operation of a statute, solicits applications for allotments of land to be surveyed by the government, and afterwards by an act offers certain other allotments of land in lieu of those offered by the former act, an applicant under the first act has a right to be refunded his principal and interest from time of payment; there being a positive contract on the part of the government to survey the land.

BELL V. THE RECEIVER OF LAND REVENUE OF SOUTHLAND ³

211. Held that an applicant for the purchase of waste lands has the right to obtain the lands at the prices for which they were for sale at the time of the application, notwithstanding that meanwhile between the date of the demand and the date of the granting thereof, the price has been raised by the governor.

PEARSON V. SPENCE ⁴

212. Held by the Judicial Committee, that where an application made, on the 27th of June, to purchase a piece of public land without any mention of price, which was then fixed by law at £1 per acre, was granted on the 1st of August, when in the interval, on the 9th of July, the price had been raised to £3 per acre, the price which should be paid by the purchaser is £1 per acre.

In an action by this purchaser against a subsequent purchaser of the same land at £3 for a declaration of title, injunction and general relief, a demurrer to the first purchaser's title cannot be maintained.

¹ Isle of Man, 1829 May 8, L. R. IV Appeal Cases 294.

² South Australia, 1873 Nov. 13, L. R. V P. O. 24.

³ New Zealand, 1876 March 11, XXXIV Law Times N. S. 629.

⁴ New Zealand, 1870 Nov. 19, L. R. V Appeal Cases 70.

PRIORITY IN APPLICATIONS.MOTT V. LOCKHART ¹

213. According to the law of Nova Scotia, R. S., 4th series, c. 9, the first applicant for a license or a lease, whether in a proclaimed or unproclaimed district, is entitled to it, if his application is in writing. And occupation and stacking off is not a condition precedent to all leases in an unproclaimed district.

REVOCATION OF GRANTS. See WRITS OF PREROGATIVE: *Scire Facias*.

RIGHT TO RESUMPTION.THOMAS V. SHERWOOD ²

214. No mode of procedure appears to be prescribed by the law of the colony of Western Australia for the taking by way of resumption of lands granted by the Crown; and the law provides for no compensation.

COOPER V. STUART ³

215. In a grant of land from the Crown, there was a clause reserving such quantity of land not exceeding ten acres as might be required for public purposes. It was held, that this reservation was not void on the grounds of repugnancy and as against perpetuities. *Lord v. Commissioners of Sidney*, 12 Moore P. C. 473.

RE-SALE OF LANDS FORFEITED.BLACKBURN V. FLAYELLE ⁴

216. By the *Crown lands alienation Act*, 1861, the government of New South Wales is authorized to dispose of Crown lands by public auction only. Under this statute, the land forfeited cannot be privately re-sold to the original purchaser.

SIR BARNES PEACOCK, p. 634:—Mr. Justice Faucett in his judgment in this case quotes the following passage from Mr. Justice Hargrave in *Drinkwater v. Arthur* (10 S. C. N. S. W. 193): "If there be any one rule of law clearer than another as to the construction of all statutes and all written instruments (as, for example, sales under powers in deeds and wills) it is this: that when the legislature or the parties to any instrument have expressly authorized one or more particular modes of sales or other dealing with property, such expressions always exclude any other mode, except as specifically authorized." That appears to their Lordship to be a correct exposition of the law, and it is substantially carrying out a principle similar to that expressed in the maxim *expressio unius est exclusio alterius*.

¹ Nova Scotia, 1883 June 30, L. R. VIII Appeal Cases 568.

² Western Australia, 1883 Nov. 24, L. R. IX Appeal Cases 142.

³ New South Wales, 1889 April 3, L. R. XIV Appeal Cases 286.

⁴ New South Wales, 1881 May 20, L. R. VI Appeal Cases 628.

SERVITUDE.THE DIVISIONAL COUNCIL OF THE CAPE DIVISION *v.* DE VILLIERS ¹

217. The respondent held his land from the Crown, by a grant of perpetual quit-rent tenure. It was decided that such a tenure is subject to servitude in favour of the Crown, giving this latter the right to take away gravel on the land for the repair of public roads, without any compensation, unless the gravel is used by the proprietor to improve cultivation, irrigation or otherwise.

TITLE TOBARTON *v.* MUIR ²

218. The respondent, acting as trustee for the appellant, and with the moneys of the latter, purchased Crown lands under the provisions of the *New South Wales Crown Lands Alienation Act*, 1861, and bound himself by a written agreement to fulfil the statutory conditions of purchase for the appellant.

Held, that such an agreement was not immoral or against public policy, and was not contrary to the terms of said act requiring the fulfilment of certain conditions by the purchaser. The respondent was the purchaser, and the respondent's right was merely that of a *cestui que trust*.

WEBB *v.* WRIGHT ³

219. The laws in this colony gives to those who have obtained a judgment in the land court, the right to demand and receive a title from the Governor and under the seal of the province.

The Crown, where such judgment has been obtained, has no right to give a conditional title including, namely, a clause reserving to the government its right to all precious stones, gold or silver found in the said land.

TRANSFER OFCOLONIAL SECRETARY OF NATAL *v.* BEHRENS ⁴

220. Where a grant is made with a clause of reservation of certain land for public purposes in case of need, the government cannot demand a transfer from the owners, in execution of this clause, except when the statute provides for compensation; the duty of the owner to transfer is not imperative, but optional, and if he refuses, the government's remedy is the special procedure provided by the statute of 1872.

¹ Cape of Good Hope, 1877 April 28, L. R. II Appeal Cases 567.

² New South Wales, 1874 Nov. 14, L. R. VI P. C. 134.

³ Griqualand West, 1883 April 4, L. R. VIII Appeal Cases 313.

⁴ Natal, 1889 May 28, L. R. XIV Appeal Cases 331.

UNDER LICENSE.**THE QUEEN V. DALLIMORE ¹**

221. The respondent had been occupying public lands for pastoral purposes during many years under annual licenses. In 1862, he obtained from the governor a license, for valuable consideration, to occupy part of these lands for one year and no longer, subject to the right of the Crown determined by colonial statutes.

In construing the statute 24 Vict. and the license, the Judicial Committee held, that the Crown had an indefeasible title to the lands and might sell them, and that the licenses obtained by the respondent did not constitute a tenancy from year to year. As soon as the respondent assented to become tenant of the diminished area only, all title to the land in question ceased, both at law and equity, and he became merely tenant at sufferance of it.

OSBORNE V. MORGAN ²

222. The right to interfere with the possession of a tenant under a formal lease, independently of the lessor, and in derogation of his rights, is not one of the natural incidents of a mere license, which carries no legal or equitable interest in the soil, and the lessor only can bring a suit to set aside a lease not void, but voidable. Same decision in *Williams v. Morgan*, L. R. XIII Appeal Cases 238.

CURATORSHIP

See MINORITY, SUBSTITUTION, TUTORSHIP.

CURÉ

See FABRIQUE.

CURRENCY**VALUE OF****MACRAE V. GOODMAN ³**

223. In a deed the term "current money of Holland" combined with the fact that Amsterdam was the place of payment, must be held to mean money of Dutch currency, and not of colonial currency. The deed was a sale made in London of a plantation in British Guiana.

See INTERNATIONAL LAW: *eodem verbo*.

CUSTOMS**FORFEITURE.****GRAHAM V. POCOCK ⁴**

224. According to the Customs ordinances of the Cape of Good Hope, goods passed under false entries are forfeited,

¹ Victoria, 1865 Dec. 7, III Moore 347.

² Queensland, 1888 Feb. 4, L. R. XIII Appeal Cases 227.

³ British Guiana, 1846 May 14, V Moore 315.

⁴ Cape of Good Hope, 1879 July 22, VII Moore N. S. 152.

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without proof of any fraudulent intention. But when an entry is true with regard one class of goods and false for another, the forfeiture applies only to the false entry.

PRINCE V. GAGNON ¹

225. By the Customs regulations of 1845, in New South Wales, every package that was landed must be included in the bill of entry, and, although a bill of entry may contain more than one "entry" within the meaning of the act, no entry can cover less than one entire package.

An entry was made of soft goods with the required declaration in verification, but no mention was made of portemanteaux and hats which were packed in cases with the other goods. The whole of the soft goods, hats and portemanteaux were seized by the custom-house officer, and forfeited.

The forfeiture was maintained by the Privy Council, upon the same principles as the case of *Graham v. Pocock* in which the circumstances were the converse of those in the present case.

¹ New South Wales, 1873 Dec. 3, L. R. V P. C. 1.

D

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DAMAGES

AGAINST JUDGES. *See JUDGE : responsibility.*

ALTERATION OF STREET.

MORISSON V. MAYOR, ALDERMEN AND CITIZENS OF MONTREAL ¹

1. A municipal corporation is liable in damages to the adjoining proprietors for the alteration of the level of public streets. *See* the remarks of their Lordships : EXPROPRIATION : *valuation*, same cause.

BREACH OF CONTRACT.

BOSWELL V. KILBORN ²

2. In an action of damages for breach of contract, the proper measure of damages is the difference between the contract price and the market price, at the time of the refusal to perform the contract.

3. A firm contracted for the sale and delivery of five tons of hops during each of the year 1855 to 1857, cash on delivery. In 1856, the vendor offered to deliver to the purchaser a quantity exceeding the five tons, and the purchaser having examined the hops refused to accept it. Hence an action of damages on the part of the vendor for breach of contract. The action was first dismissed by the Superior court, but the Court of Appeal reversed the judgment and ordered a performance of the contract.

The Judicial Committee reversed this last judgment, and held that as the five tons of hops had never been separated from the bulk, and as there was no complete tender and delivery, the vendor could not sue for the price, but only to recover damages on an action for breach of contract.

4. It is not competent for a court, to convert an action of damages for breach of contract on the refusal of vendee to accept the articles tendered to him, into a suit to enforce the performance of the contract, and to order that contract to be carried out by their judgment.

5. There is no material difference between the English law and the old French law with respect to the completion of a contract of sale.

¹ Quebec, 1877 Dec. 10, L. R. III Appeal Cases 148.

² Lower Canada, 1862 Feb. 7, XV Moore 309.

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RIGHT HON. LORD CHELMSFORD, p. 320 :—The learned judge of the Superior Court treated the action as one brought to enforce the performance of the contract by compelling the defendant to take the hops and to pay the price, and as the Plaintiffs did not by their declaration offer to deliver to the Defendant the quantity of hops in pursuance of the agreement, and as the tenders alleged in the declaration were not followed by a request that they might be judicially declared to have been good and valid, he dismissed the action with costs, reserving to the Plaintiffs the right of appeal.

This judgment, however, was reversed by the Court of Queen's Bench, the Chief Justice dissenting from the reasons on which it was founded, and the other judges declining to enter into them, considering them as objections which the judge had no right to raise, the parties themselves having waived them. The Court, therefore, proceeded to pronounce its own Judgment, that the Defendant should, within fifteen days from the service upon him of a copy of the judgment, pay to the Plaintiffs the sum of 560*l.* currency (being the contract price of the hops), with interest, and that upon payment the Plaintiffs should give to the Defendant a delivery note upon the occupier of the store where the hops were deposited for the delivery to the Defendant of five tons weight, to wit, fifty bales, of the hops which had been tendered and stored, and that upon default of payment within fifteen days, and upon leaving with the Prothonotary of the Court the delivery order or duplicate, one for the Defendant and the other to remain of record, execution should issue against the Defendant.

Even if this judgment were properly adapted to the form of action chosen by the Plaintiffs, it would be open to great objection. By the contract, delivery is to precede payment. By the judgment payment is to be made, not merely before but without any delivery. The Defendant is adjudged to pay within fifteen days after service of a copy of the judgment; if he does not, the Plaintiffs by merely depositing with the officer of the Court the delivery order in duplicate, would be entitled to sue out execution. And supposing the Defendant should pay the money and obtain the delivery order, the Plaintiffs would have discharged themselves of every duty imposed upon them by the judgment, and yet the Defendant might be unable to obtain the hops in accordance with the contract in consequence of the store-keeper having a lien upon them, or by the loss or deterioration of the hops while they were at the risk of the vendor. But the Appellant contends that looking to the form of action, the judgment is one which it was not competent to the Court to pronounce. He says that the action is brought, not to compel the performance of the contract, but for damages for breach of the contract by the Defendant in not accepting the hops, and that the proper measure of damages in such an action is the difference between the contract price and the market price, at the time of the refusal to perform the contract. If this question were to be decided by English law, there could be no doubt as to the extent of the Defendant's liability under the circumstances of the case. Where there is a sale by weight or measure, and (to use Lord Ellenborough's

BREACH OF CONTRACT.

language in *Bush v. Davis*, 2 M. and S. 403) "any acts are to be done to regulate the identity and individuality of the thing to be delivered, it is not in a state fit for immediate delivery;" and no action for goods bargained and sold can be maintained to recover the price. The only remedy open to the vendor (if the circumstances of the case give him a right to complain of a breach of contract) is by an action for non-acceptance. The necessity of separating and distinguishing the article sold from a larger quantity in order to constitute a complete delivery cannot be more strongly exemplified than in the case of *Cunliffe and Harrison* (6 Exch. 903), which was cited in the course of the argument for the Appellant. But the Respondents contend that whatever may be the law of England on this subject, the case is to be tried by the old French law, in which the principles to be applied are different; and that by that law a vendor in some cases may recover the full price agreed upon, where there has been no complete delivery of the subject according to the terms of the contract. Their Lordships have been referred in support of this view to the Civil Law, and also to the writings of various Jurists, and particularly to the Treatise of Pothier, "*Du Contrat de Vente*," which contains all the learning upon the subject. A very few passages from this Treatise will show that there is no material difference between the English law and the old French law, with respect to the completion of contracts. Pothier, in his Treatise, partie iv. fol. 309, states, with his usual clearness when a contract is to be regarded as perfect, and when it is imperfect. He says: "*Ordinairement le contrat de vente est censé avoir reçu sa perfection aussitôt que les parties sont convenues du prix pour lequel la chose serait vendue. Cette règle a lieu lorsque la vente est d'un corps certain, et qu'elle est pure et simple. Si la vente est de ces choses qui consistent in quantitate et qui se vendent au poids, au nombre, ou à la mesure, comme si l'on a vendu dix minots de blé de celui qui est dans un tel grenier, dix milliers pesant de sucre, un cent de carpes, &c., la vente n'est point parfaite que le blé n'ait été mesuré, le sucre pesé, les carpes comptées, car jusqu'à ce temps nondum apparet quid venierit.*" So far the law is tolerably clear, but upon the question whether when goods are sold by number, weight, or measure, the property is transferred to the buyer immediately or only after the goods have been counted, weighed, or measured, there is some difference of opinion.

Dalloz, in his "*Répertoire de Législation de Doctrine et de Jurisprudence*," titre "*Vente*," chapter 3, section 1, ranges the Jurists upon the opposite sides of the question, and suggests a distinction to reconcile the difference between them. He puts a case where the seller says to the buyer, "I agree to sell you so many gallons of wine in a cellar at so much a gallon;" here (he says) is not only a sale by measure, but also a sale of an indeterminate thing, therefore such a sale does not operate an immediate transfer of the property. And he adds, "*Tout le monde est d'accord sur ce point.*" But where the vendor says, "I agree to sell you all the wine in this cellar at so much a gallon," here the doubt arises. In this latter case the thing is ascertained, and it may be said there is no reason

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why the property should not pass immediately to the buyer. But even in such a case Dalloz states his concurrence with the opinion of Troplong that until the measurement the wine remains at the risk of the seller. It is true (he says) the thing is ascertained, but the price is not; but the price is like the thing itself, an essential element of the sale, and the ascertainment of the price is not less necessary than the identification of the thing to the completion of contract. The delivery of the thing, and its being at the risk of the buyer, appear to be convertible terms, and it seems clear from all the authorities that upon a sale by weight or measure, until the thing is ascertained by weighing or measuring, it remains at the risk of the seller. Pothier in the same section (309), which has been already referred to, says, "It is only after measuring, &c., that the thing sold is at the risk of the buyer;" "car les risques ne peuvent tomber que sur quelque chose de déterminé."

It is difficult to understand how the vendor can have any claim to receive the price of the thing contracted for until he has separated it for the use of the buyer. Until it is ascertained and identified, it may be properly said to have no existence. And yet there is one short passage in Pothier, sec. 309, which is opposed to all his reasoning in the same section upon which the Respondents rely as establishing the propriety of the judgment in their favour. The passage is this: "Il est vrai que dès avant la mesure, le poids, le compte, et dès l'instant du contrat, les engagements qui en naissent existent. L'acheteur a dès lors action contre le vendeur, pour se faire livrer la chose vendue, comme le vendeur a action pour le paiement du fruit en offrant de le livrer." One may fairly ask, To deliver what? The contract does not give the thing existence; it depends upon the vendor himself whether it shall ever exist. When there is a condition precedent to his right to the price unperformed by him, it is difficult to understand how he can recover the price upon a mere offer to perform.

The Chief Justice treats the present case as one where the vendor has executed his contract, and has done all that depends upon him to entitle him to an action *ex vendito* against the vendee, and he goes on to say that from the moment the vendor has offered to deliver the thing sold, and has put the vendee in a position to receive it, the thing is at the risk of the vendee. But how was the vendee in a position to receive the hops in this case? He could not go to the store and help himself out of the bulk to the proper quantity. And as to the hops being at the risk of the vendee, the Chief Justice is here directly opposed to the authority of Pothier, in the passage which has just been mentioned. It must always be borne in mind that, by the terms of the contract, the delivery in this case was to be made by the vendors, and therefore that an actual delivery by them, or acts done by them which were equivalent to a delivery, were a necessary preliminary to their being entitled to the price. This the Court appears to have overlooked, for in their judgment they say that "it was fully in the Appellants' power to have set apart, distinguished and taken away five tons weight of good and merchantable hops from among the said bales," thereby attributing

BREACH OF CONTRACT.

to the Appellants the performance of acts which by the contract belonged to the Respondents.

The judgment therefore proceeds upon false grounds, even if it was competent to the Court to give a different kind of relief to that which the Plaintiffs claimed in their declaration. The Plaintiffs demand damages for breach of the contract on the refusal of the Defendant to accept the hops tendered to him. The Court has converted the proceeding into a suit to enforce the performance of the contract, which they order or intend to order by their judgment to be carried out. This the Respondents contend they had a right to do, and they referred to a passage in 4 Guyot's "Répertoire," *verbo* "Conclusions," p. 351, which the Court was said to have acted upon in a former case, that "le Juge peut rejeter, accorder, ou modifier les conclusions prises par les parties." Whether the power thus described can be pushed to the extent of enabling the Court to change the nature of the action and to administer relief entirely different from that which is sought by the Plaintiffs, may be extremely questionable. But if such a power exists, it can hardly be exercised with propriety in a case where a party has the choice between two remedies. Assuming that the Plaintiffs might have instituted a suit to enforce the performance of the contract, it cannot be doubted that they were at liberty to waive this form of proceeding, and to bring their action to recover damages for breach of contract. And when they have deliberately preferred the latter remedy, it ought not to be in the power of the Court to force upon them the other, to which they made no claim. Their action is in form and in substance a demand for damages merely for the breach of the contract in not accepting the hops. In such an action it was not disputed that the Plaintiffs could not recover the price of the hops, but only the difference between the contract price and the market price at the time of the breach of the agreement.

McDOUGALL V. MCGREEVY¹

6. In an action for breach of contract, where shares of a corporation had been sold with the right of redemption, and the purchaser had disposed of the shares and could not deliver them in the agreed delay, it was held that the vendor having tendered the amount due, would be entitled to recover from the purchaser as damages the sum which he could have obtained for the shares beyond the amount which he had to pay to get them back. But the plaintiff having failed on his evidence, the action was properly dismissed. See PETITION OF RIGHT.

BY COLLISION. See COLLISION: *parties in fault.*

¹ Quebec, 1889 July 20.

DAMAGEABLE STATEMENTS.HAMON V. FALLE¹

7. An insurance company intimated to the proprietors of a vessel that if the appellant, a master mariner, whom the latter had engaged as master, was to be retained, the company would refuse to continue to insure the ship. The appellant having, in consequence, lost his employment, brought an action in damages against the company for malicious defamation to the amount of £900. The plea was that the company acted in good faith and without malice or any desire to injure the appellant, and in the honest belief that it was in their interest to disclose the information they had received.

The Privy Council held that the representation made by the company was clearly one made in the conduct of its own affairs, and in matters in which their own interest was concerned. Their Lordships approved of the principles of Mr. Baron Parke in *Toogood v. Spryng*, 1 C. M. and R. 193: "In general an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned."

DANGERS OF THE SEA.PEACE V. GLOAHEC²

8. It was agreed, in a bill of lading, that the goods were to be delivered in port in good order, "the dangers of the seas excepted." Damages were suffered by the cargo, which consisted of animals, vegetables and other things of that kind.

Held that the apparent cause of damage arose from the nature and collocation of the cargo, and from want of ventilation, and that it did not come within the exception "dangers of the seas."

SIR JOSEPH NAPIER, p. 39. — The words in the bill of lading "dangers of the seas" must, of course, be taken in the sense in which they are used in a policy of insurance. It is a settled rule of the law of insurance, not to go into distinct causes, but to look exclusively to the immediate and proximate cause of the loss. *Clark v. Barnwell*, 12 Howard 273.

DEMURRAGE. See AFFREIGHTMENT: *damage for delay in shipping.*

¹ Jersey, 1879 Feb. 8, L. R. IV Appeal Cases 247.

² Admiralty, 1866 June 23, III Moore N. S. 556.

DETENTION OF GOODS.

MIEDBRODT V. FITZIMON, THE "ENERGIE" ¹

9. When the master of a ship has a lien upon freight for general average contribution, and upon cargo for damages, he has, under the Merchant Shipping Act, 1862, sects. 67, 68, the right to discharge the cargo in a warehouse and to put upon it a stop order, but, in so doing if the stop order is for an amount in excess of the sum due, and if he refuses to deliver the cargo to the consignee upon payment of the sum rightly due, he is liable in damages for illegal detention.

EXERCISE OF LEGAL RIGHT

ROGERS V. DUTT ²

10. A legal and *prima facie* innocent act may become illegal and damageable if it invades the right of a third party, as for instance, where a neighbour has acquired by twenty years enjoyment an easement of light over a property, and the owner of it builds a construction obstructing the view so acquired, the neighbour has an action in damages.

11. An action is maintainable against an official for an act done in the exercise of his duty, where malice and a tortious act are alleged and proved against him.

12. An order was issued by the superintendent of marine, in his official capacity, prohibiting the pilots at his service from allowing a particular steam tug to take any ship in tow because the charges of the steam tug were considered exorbitant, and by this order such owner was deprived for a time of the profits of being employed by the pilots in charge of ships going up or down the river. In the absence of malice, alleged or to be inferred, that order was held not to be such a wrong as would sustain an action by the owner of the tug against the superintendent of marine, the officer of the government issuing such order. The government had the same rights as a private individual in declining to employ the tug if the charges were too high.

THE RIGHT HON. DR. LUSHINGTON, p. 236 : — For if the act which he did was in itself wrongful, as against the plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it was done by the order of the superior power. The civil irresponsibility of the Supreme power for tortious acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the government is

¹ Ireland, 1875 April 24, L. R. VI P. C.

² Calcutta, 1860 July 30, III Law Times N. S. 160, XIII Moore 209.

EXERCISE OF LEGAL RIGHT.

morally bound to indemnify its agents, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration. Neither in the case of damage occasioned by a wrongful act, that is, an act which the law esteems an injury, is malice a necessary ingredient to the maintenance of the action: an imprisonment of the person, a battery, a trespass on land, are instances, and only instances, in which the act may be quite innocent, even laudable, as to the intention of the doer, and yet, if any damage, even in legal contemplation, be the consequence, an action will lie.

But the foundation of every action of tort, apart from the question of malice, is an act wrongful, and which may be qualified legally as an injury. This position is not contravened in the very able and learned judgment of the Court below, indeed, it is assumed as the principle of decision, and the wrongful act relied on is stated to be the invasion of "the right of the plaintiffs to employ their vessels in towage; in other words, the right of exercising their lawful trade or calling, without undue hindrance or obstruction from others." No doubt an act which, *prima facie*, would appear to be innocent and rightful, may become tortious if it invades the right of a third person. A familiar instance is, the erection on one's own land of anything which obstructs the light of a neighbour's house, *prima facie*, it is lawful to erect what one pleases on one's own land; but if by twenty years' enjoyment, the neighbour has acquired the right to the unobstructed transmission of the light across that land, the erection of any building which substantially obstructs it, is an invasion of the right, and so not only does damage, but is unlawful and injurious.

FOR ADULTERY.

NORTON V. SPOONER¹

13. A civil action for the recovery of damages against a defendant for criminal conversation and adulterous connection had with the plaintiff's wife lies by the Dutch law, which is the old Roman law as altered by local ordinances; this redress being recognized throughout every part of the continent of Europe. The judgment of the court below rejecting a demurrer to the action, affirmed by the Judicial Committee.

THE LORD JUSTICE KNIGHT BRUCE, p. 127:—It has been said, that throughout every part of the continent of Europe where, more or less, the civil law, in a state of less or greater deflection from its original condition, has prevailed, the action for damages against an adulterer is unknown. Their Lordships are not satisfied that the case is so. They believe that a full investigation would show that in one shape or another damages have been successfully sought in various instances upon the continent of Europe in such cases. Not

¹ British Guiana, 1864 July 4, IX Moore 103.

FOR ADULTERY.

less than two instances ¹ have been produced from France, in which damages were distinctly given to the husband; and their Lordships are of opinion that more might be found.

FRIGHT, NERVOUS SHOCK, MENTAL INJURY.**VICTORIAN RAILWAYS COMMISSIONERS V. COULTAS ²**

14. Where the gate-keeper of a railway company had negligently invited the plaintiffs to drive over a level crossing when it was dangerous to do so, and the jury, although an actual collision with a train was avoided, nevertheless assessed damages for physical and mental injuries occasioned by the fright, it was held that the verdict could not be sustained, and that judgment must be entered for the defendants.

SIR RICHARD COUCH, p. 225:—The rule of English law as to the damages which are recoverable for negligence, is stated by the master of the Rolls in *The Motting Hill*,³ a case of negligent collision. It is that the damages must be the natural and reasonable result of the defendant's act; such a consequence as in the ordinary course of things would flow from the act..... According to the evidence of the female plaintiff her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages existing from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in cases of alleged physical injuries of determining whether they were caused by the negligent act, would be greatly increased, and a wide field opened for imaginary claims.

ILLEGAL ARREST.**SINCLAIR V. BROUGHTON AND THE GOVERNMENT OF INDIA ⁴**

15. The respondent Broughton was a military officer in command of a cantonment. Believing the appellant to be a dangerous lunatic, he had him arrested and examined by a

¹ Ferrière, *Jurisprudence du Code*, tom. II, liv. IX, titre IX, p. 450.

² Victoria, 1888 Feb. 4, XIII L. R. Appeal Cases, 222.

³ 9 P. D. 105.

⁴ Oude, 1882 June 23, XLVII Law Times N S. 171.

ILLEGAL ARREST.

medical man, and on the report of the latter, he was discharged from arrest. In an action of damages against the commanding officer and the government, it was held, that the appellant was entitled to damages, as the officer had acted without authority, although in good faith.

ILLEGAL SEIZURE.

HENOS V. ALDERSLEY, THE "EVANGELIMOS" ¹

16. A collision between two vessels at sea having taken place, one of them caused the other to be seized to answer an action in damages. After the action had been dismissed, the owners of the seized vessel entered an action against the plaintiff, but no damages were allowed, there being no evidence of bad faith or *crassa negligentia*, which might imply malice.

THE RIGHT HON. P. PEMBERTON LEIGH, p. 359 :—The real question in this case, following the principles with regard to actions of this description, comes to this : is there or is there not reason to say that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the plaintiff, or that gross negligence which is equivalent to it?

SCHACHT V. OTTER, THE "OSTREE" ²

17. In an action praying for restitution of ship and cargo with costs and damages against captors, where the seizure was made without probable cause for a pretended breach of blockade; it appeared that the ship arrested had by her conduct given rise to suspicions and was partly to blame for her own detention. The action was dismissed.

THE RIGHT HON. P. PEMBERTON LEIGH, p. 165 :—The natural rule is, that if a party be unjustly deprived of his property, he ought to be put as nearly as possible in the same state as he was before the deprivation took place; technically speaking, he is entitled to restitution with costs and damages. This is the general rule upon the subject, but like all other general rules, it must be subject to modification. If, for instance, any circumstances appear which show that the suffering party has himself furnished occasion for the capture, if he has by his own conduct in some degree contributed to the loss, then he is entitled to a somewhat less degree of compensation, to what is technically called simple restitution. *The Actæus* 2 Dod, 51.

Doss v. Doss ³

18. When a man's domicile or dependencies are violated under colour of legal process, he is not obliged to submit to

¹ Admiralty, 1858 July 6, XII Moore 352.

² Admiralty, 1855 Feb. 23, IX Moore 150.

³ Agra, 1866 Mars 17, XIV Law Times N. S. 646.

ILLEGAL SEIZURE.

this invasion, or to prevent the intruder from doing as little harm as possible as, for example, by removing the lock of his own warehouse to prevent it from being forced open; and in case of such an invasion, he would be entitled to recover not only special damages demanded and proved, but exemplary damages, even in cases where he failed to prove the special damages.

SIR E. WILLIAMS, p. 648: — If it be important, in India, to check any tendency to resist the execution of legal process, it is hardly less important to maintain the principle that they who misuse legal process are responsible for the consequences of that misuse.

The principle ordinarily applied to actions of tort is, that the plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the gist of the action. Thus in an action of slander for words actionable *per se*, when the plaintiff lays special damages, and fails to prove it, he is nevertheless entitled to such damages as the jury think right to give him. It would be otherwise if the words were not actionable *per se*.

WILSON V. THE QUEEN ¹

19. Although damages may be obtained in the Court of Admiralty in the same cause in which the principal question is disposed of, a separate action for damages also lies where there is gross negligence or bad faith.

LORD JUSTICE CAIRNS, p. 314: — Undoubtedly there may be cases in which there is either *mala fides* or that *crassa negligentia* which implies malice, which would justify a Court of admiralty giving damages, as in an action brought at common law damages may be obtained. In the Court of admiralty the proceedings are, however, more convenient, because in the action in which the main question is disposed of damages may be awarded. The real question in that case, following the principles laid down with regard to actions of this description, comes to this — is there, or is there not, reason to say that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the plaintiff, or that gross negligence which is equivalent to it?

THE QUEEN V. CASACA ²

20. The plaintiff, who had seized a ship, was condemned in costs and damages for illegal seizure, although there were on board articles which were those generally employed in the slave trade and which misled the plaintiff in making

¹ V. Admiralty of Sierra Leone, 1886 Dec. 11, IV Moore N. S. 307.

² Sierra Leone, 1880 May 6, L. R. V. Appeal Cases 548.

ILLEGAL SEIZURE.

the seizure. But other circumstances and the ship's papers were sufficient to establish the true character of the ship, and its seizure could not be justified.

MEASURE OF

McTINK V. BENT¹

21. The respondent obtained an interdict restraining the appellant from selling any of the produce of the lands upon which he had a mortgage until his claim should be fully satisfied. The interdict having been contested was set aside and the respondent condemned to indemnify the appellant for all losses he had suffered in consequence. The appellant then brought an action to have his damages assessed, but this action was dismissed, the court rejecting the claim in toto. The Judicial Committee reversed this decision, and held that the appellant had suffered damages, as the first judgment of the court had recognized that they were due. The record was remitted to the court below to assess the damages.

ROBERTSON V. DUMARESQ²

22. The principles upon which damages are given in any action of damages for breach of contract were exposed by the Judicial Committee as follows :

LORD CHELMSFORD, p. 94 :—The only remaining questions relate to the damages..... But upon what ground can it be alleged that the judge was wrong in telling the jury to find their damages upon the present value of the land? The cases which were cited as to the measure of damages upon contracts for delivery of goods and for the re-transfer of stock have very little application. The distinction between these two classes of cases is said to be that in the former the damages should be only the value of the goods at the time when they ought to have been delivered, because the purchaser has his money in hand, and may go into the market and purchase similar goods; but as to stock, that the borrower who neglects to re-transfer at the time agreed upon holds in his hands the money of the lender, and prevents him using it.

The principle upon which damages are estimated upon the breach of an agreement for the re-transfer of stock is more applicable to the respondent's claim than that which is applied to contracts for the sale and delivery of goods, but the right of the respondent to the highest value of the land which he has not received in performance of the promise made to him, seems to be even stronger than that of the lender of stock, upon the borrower's omission to replace it. The owner of the stock might have the means of purchasing other

¹ British Guiana, 1843 Feb. 18, IV Moore 213.

² New South Wales, 1864 Feb. 6, II Moore 66.

MEASURE OF

similar stock at the day, but the allotment of land promised to the respondent was a thing which he could not obtain except by the performance of the promise. If he had received his allotment as he ought to have done, he would have had it, with the benefit of the increased value which it might have acquired while in his possession. Of this the other party has deprived him by the breach of his promise; and whether he has obtained the benefit himself, or has hindered the respondent from enjoying it, it seems to be equally just and reasonable that he should pay the full value of the property to the person from whom he has wrongfully withheld it.

LARIOS V. BONANY Y GURETY ¹

23. In an action for breach of agreement to pay a sum of money, when a merchant obliged himself for valuable consideration to open a credit in behalf of another, substantial damages, and not only the principal sum of money contracted to be paid and interest, may be recovered.

GRAND TRUNK RY CO OF CANADA V. JENKINS ²

24. The right conferred by the Ontario laws (C. S. O ch. 135, ss. 2 and 3) to recover damages in respect of death occasioned by wrongful act, neglect or default, is restricted to the actual pecuniary loss sustained by the plaintiff.

25. When the deceased had nothing and earned nothing, there is no loss, and, therefore, no claim; when the deceased had an income derived from his labor and exertions, his widow and children may claim damages according to the reasonable probability of life, work and earnings if the deceased had lived.

26. Where the plaintiff is the widow, and her husband had made provision for her by a policy on his own life in her favour, the amount of such policy is not to be deducted from the amount of damages previously assessed irrespective of such consideration, as she is benefited only by the accelerated receipt of the amount of the policy, and that benefit being represented by the interest of the money during the period of acceleration, may be compensated by deducting future premiums from the estimated future earnings of the deceased.

27. In such cases, all the circumstances which can have any bearing to increase or diminish the amount of the damages should go to the jury as matters of fact.

LORD WATSON, p. 803:—In *Beckett's case* (³), as well as in the present, all the courts below have justly held that the right conferred

¹ Gibraltar, 1873 May 3, L. R. V. P. C. 346.

² Ontario, 1888 Aug. 4, L. R. XIII Appeal Cases 800.

³ 13 U. C. R. C. A. 174.

MEASURE OF

by statute to recover damages in respect of death occasioned by wrongful act, neglect or default, is restricted to the actual pecuniary loss sustained by each individual entitled to sue. In some circumstances, that principle admits of easy application; but in others, the extent of loss depends upon a date which cannot be ascertained with certainty, and must necessarily be matter of estimate, and, it may be, partly of conjecture. When a man has no means of his own, and earns nothing, it is obvious that his wife or children cannot be pecuniary losers by his decease. In like manner, when by his death the whole estate from which he derived his income passes to his widow, or to his child (as was the case in *Pyne v. Great Northern Railway* (1)), no statutory claim will lie at their instance. A very different case arises when the means of the deceased have been exclusively derived from his own exertions, whether physical or intellectual. It then becomes necessary to consider what, but for the accident which terminated his existence, would have been his reasonable prospects of life, work and remuneration; and also how far these, if realized, would have conduced to the benefit of the individual claiming compensation.

Their Lordships are of opinion that all circumstances which, though insufficient to exclude a statutory claim, may be legitimately pleaded in diminution of it, ought to be submitted to the jury, whose special function it is to assess damage, with such observations from the presiding judge as may be suggested by the facts in evidence. It appears to their Lordships that money provisions made by a husband, for the maintenance of his widow, in whatever form, are matters proper to be considered by the jury in estimating her loss; but the extent, if any, to which these ought to be imputed if imputed in reduction of damages must depend upon the nature of the provision and the position and means of the deceased. When the deceased did not earn his own living, but had an annual income from property, one half of which has been settled upon his widow, a jury might reasonably come to the conclusion that, to the extent of that half, the widow was not a loser by his death, and might confine their estimate of her loss to the interest which she might probably have had in the other half. Very different considerations occur when the widow's provision takes the shape of a policy on his own life, effected and kept up by a man in the position of the deceased Wm. Jennings. The pecuniary benefit which accrued to the respondent from his premature death consisted in the accelerated receipt of a sum of money, the consideration for which had already been paid by him, out of his earnings. In such a case, the extent of the benefit may fairly be taken to be represented by the use as interest of the money during the period of acceleration; and it was upon that footing that Lord Campbell, in *Hicks v. Kemport, etc., Ry Co.* (2), suggested to the jury that, in estimating the widow's loss, the benefit which she derived from acceleration might be compensated by deducting from their estimate of the future earnings of the deceased the amount of

1 2 B. & S. 757; S. C. 4 B. S. 396.

2 4 B. & S. 403 n.

MEASURE OF

the premiums which, if he had lived, he would have had to pay out of his earnings for the maintenance of the policy. *See also* DAMAGES: *breach of contract.*

NEGLIGENCE.**THE QUEEN V. WILLIAMS ¹**

28. An Executive government having the control and government of a tidal harbour is bound by law to take reasonable care that vessels using the wharves should do so in the ordinary manner and without danger to others.

29. And when their servant, the harbour-master, has had notice of a dangerous spot, and no inquiry is made, no notice is given to vessels entering into the harbour and no means are taken to protect the vessels, the government is liable in damages, *Lancaster Canal Company v. Parnady*, 11 A. & E. 230; *Merrey Docks Trustees v. Gibbs*, Law Rep. 1 H. L. 93; *Jolliffe v. Wallasey Local Board*, Law Rep. 9 C. P. 62.

NON DELIVERY IN SALES.**MACLAREN V. MURPHY ²**

30. This was an action for damages for non-performance of a contract for the sale of certain spars and timber, "to be delivered free of charge to-morrow, or as soon as they can be got out of the hands of the guardian; but the purchasers not bound to take them if not delivered in one week unless they like." No delivery was made within the time specified, by reason of the guardian in possession of the spars insisting on retaining them in consequence of a writ of *saisie-arrest* issued in an action instituted against the ostensible owner of them, notwithstanding that the guardian was released by subsequent proceedings and might have legally given them up.

The vendor was held not liable in damages, on the ground that the reasonable construction of the words getting "out of the hands of the guardian," was the actual, and not the constructive or legal title to the possession, which could alone insure the delivery.

BROWN V. DIBBS ³

31. The respondent sold to appellant half of the New Lambton Colliery, a coal mine in working operation, with all the machinery therein. The vendor delayed the delivery by a transfer of the mine and meanwhile made large profits in working it. The action was by the buyer for specific

1 New Zealand, 1884 April 9, L. R. IX Appeal Cases 418.

2 Quebec, 1872 June 5, IX Moore N. S. 1.

3 New South Wales, 1877 May 4, XXXVII Law Times N. S. 171.

NON DELIVERY IN SALES.

performance and for an account of profits made since the contract of sale. The court of Equity gave judgment for Plaintiff, and the Judicial Committee, confirming this judgment, held: that the claim of the Plaintiff was the market value per ton of the coal *in situ naturali*, calculating that value upon what the coal would sell for, deducting therefrom the expense, not only of carrying it to the market, but of severing it so as to make it a chattel. *Martin v. Paster*, 5 M. & W. 351; *Jegon v. Vivian*, L. Rep. 6 ch. 742.

RESPONSIBILITY OF RAILWAY COMPANY. See RAILWAY: *iusdem verbis*. See also PETITION OF RIGHT.

DEBENTURES

See HYPOTHEC: *construction of debentures*.

DELIVERY

See DAMAGES, GIFT, SALE.

DEMURRAGE

See AFFREIGHTMENT: *damages for delay in shipping*.

DEPOSIT**RENTONATION OF**

DINES V. WOLFE ¹

32. An agreement was made between two parties, and a stake deposited into the hands of respondent, to abide a match between two horses at a horse-race agreed to be run under the *Australian Jockey Club rules*. The stake having been remitted to the party who deposited the money, the appellant brought an action against the respondent claiming the amount deposited. The plea was that although the race was run under the auspices of the *Australian Jockey Club*, it was not run under the club's rules as provided by the agreement. The Judicial Committee decided in favour of the respondent.

TREFTZ V. CANELLI ²

33. While a settlement of litigation was going on between two merchants, they agreed, in order to secure the appellant's debt, that the other should make a deposit with the respondent of certain bills of exchange, this latter constituting himself a voluntary depository of them and agreeing to be responsible for the bills "until the effective encashment of

¹ New South Wales, 1869 Feb. 2, L. R. II P. C. 280.

² Constantinople, 1872 June 14, IX Moore N. S. 22.

RESTORATION OF

them, which remains entrusted to the depositor." When the bills became due, the respondent gave them to the depositor to be cashed. In a suit against the depositary, it was held that the delivery of the bills was not a breach of duty, and that the respondent was not bound to see that the money should be handed over to the appellants.

DISCHARGE

See CREDITORS, COMPOSITION, INSOLVENCY, SURETYSHIP.

DISTRIBUTION

See PARTITION, INSOLVENCY.

DIVORCE**GROUND FOR**

WILSON V. WILSON ¹

34. The parties were separated in 1847 on account of cruelty on the part of the appellant towards his wife. They had since cohabited. Upon her return home the wife was subjected to treatment, which, if not amounting to personal violence, at least showed the malignity of the husband's disposition. The language of the husband was held to constitute cruelty in view of what had occurred before.

35. It is unnecessary in such a case that there should be actual violence; it is sufficient in order to revive the cruelty in the former period of cohabitation that there should be enough to justify a reasonable apprehension and well founded ground of alarm.

36. The cohabitation after the first reparation was not a condonation of the former cruelty.

DOL

See CONTRACT, EVIDENCE, FRAUD.

DOMICILE**OF ENGLISH OFFICER**

HODGSON V. DEBEAUCHESNE ²

37. The Privy Council held that it was not competent to an English officer in the service of the East India Company, in India, to acquire a domicile in a foreign state, as such domicile was incompatible with the obligations and duty of an officer in the military service of the Queen and the said Company; and that he had retained his English domicile in India, although he had chosen to reside with his family

¹ Canterbury, 1849 June 25, VI Moore 84.

² Canterbury, 1882 July 14, XII Moore 285.

OF ENGLISH OFFICER.

in France during twenty years and had property there, retaining, however, the great bulk of his property in England.

88. The presumption of law arising from his profession and *status* was against any intention by him to abandon his original domicile and acquire a new domicile in a foreign state, as it cannot be presumed that he had an intention contrary to his duty as an officer in the military service.

THE RIGHT HON. DR. LUSHINGTON, p. 318: — It might be asked, whether the acquisition of a foreign domicile did not entail on the person acquiring it a liability, *jure gentium*, to serve in a military capacity in such foreign country, a liability clearly incompatible with the obligations of an officer in the service of the Queen and East India company.

Indeed, this view of the case involves other consequences, for it is not merely a question of domicile in *France*, but domicile in any other country, however distant. A settled domicile in a country, imports an allegiance to the country, very different from a mere obedience to its laws during a temporary residence.

In solving these difficulties we must always look to the *jus gentium*; this proposition, however true, requires explanation. The tribunal which tries a question of this description is necessarily bound by the law of the country in which it is situated, and by which it is constituted. That law, whatever it may be, it must necessarily obey; but it is not bound to respect the laws of any foreign country, save so far as they are in accordance with the *jus gentium*.

We do not think it necessary for the decision of this case that we should lay down, as an absolute rule, that no person, being colonel of a regiment in the service of the East India company, and a general in the service of Her Majesty, can legally acquire a domicile in a foreign country. It is not necessary, for the decision of this case, to go so far, but we do say, that there is a strong presumption of law against a person so circumstanced, abandoning an English domicile, and becoming the domiciled subject of a foreign power.

MARRIAGE IN THE PROVINCE OF QUEBEC.

McMULLEN V. WADSWORTH ¹

39. Domicile for purposes of marriage is used, in article 63 of the Code Civil, in the sense of residence; and although this domicile may be acquired by six months residence for the above object, a man does not thereby lose his international domicile which governs his moveable property.

40. Where in an act of marriage signed by the husband and the wife, the husband described himself as "a day laborer of the city of Quebec," this did not amount to a binding declaration by the husband that he was domiciled in Lower Canada with the legal effect of governing his status and civil rights.

¹ S. C. Quebec, 1889 July 27, L. R. XIV Appeal Cases 631.

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SIR BARNES PEACOCK, p. 136: — The question to be determined in this case is whether James Wadsworth, by his marriage in September, 1828, with Margaret Quigley, widow of James McMullen, subjected himself to the legal community of property as then established in Lower Canada.

The majority of the learned Judges of the Supreme Court held that his international domicile was not in Lower Canada or Quebec, and the special leave to appeal to Her Majesty in Council was not granted for the purpose of reviewing that finding, which depended upon a mere question of fact, but in order to determine what was the legal effect of the certificate or *acte de mariage*, signed by Wadsworth and his wife, in which he was described as a day laborer, of the city of Quebec, and by which two of the learned Judges of the Supreme Court held that he was bound as amounting to a declaration that he was domiciled there.

Mr. Justice Taschereau, one of these two Judges, in his judgment says: —

“By representing to his wife, as he must be held to have done by the *acte de mariage*, that his domicile was at Quebec when he married, Wadsworth guaranteed to her, contracted with her in law, that she would be *commune en biens* with him. Now, could he have been admitted in his lifetime, under any circumstances, in an action *en séparation de biens*, for instance, to contend that this declaration as to his domicile was a false one, or, in other words, that he had induced his wife to marry him under false pretences or representations? Would he have been received so to invoke his own fraud in order to deprive his wife of her share of the community? Undoubtedly not. Well, who is the appellant here? Clearly, purely and simply, the representative of Wadsworth, the warrantor of his deeds, entitled to what he himself would have been entitled to, but to nothing more. How can she then invoke Wadsworth's fraud to deprive the respondents of their share of this community? And when she does so when she avails herself of Wadsworth's fraud, is she not then herself, in the eyes of the law, committing a fraud?”

He added, —

“This is a very important case, not only for the parties thereto on account of the large amount involved, but also for the public at large. It involves an intricate question of international law, which, as pointed out by the learned Chief Justice of the Court of Queen's Bench, may hereafter often arise in this country. We expect in the near future from the United Kingdom, and in fact from all Europe, a large immigration, and evidently cases like the present one must eventually with us become more frequent. But further than that, a principle of not less importance for the Province of Quebec is at stake, that is, whether the rules of the French law as to evidence are to govern such cases or not. For the appellants, in the course of a most able and elaborate argument, have failed to cite a case from France in which it has been held that a different *coutume* than the one settled by the *acte de mariage* can be invoked to defeat a wife's claims or her heirs.”

It was in consequence of the latter portion of this judgment, which

MARRIAGE IN THE PROVINCE OF QUEBEC.

was referred to in the petition for special leave to appeal to Her Majesty in Council, that the leave to appeal was granted. In discussing the case in the courts below, as well as in the arguments of counsel before their Lordships, the Civil Code of Lower Canada has been referred to as containing the law upon the subject, for, although the Code was not in existence at the time of the marriage, it is admitted that it correctly expresses the law as it then existed, so far as this case is concerned.

Article 1260 of the Code provides that, if no covenants have been made, or if the contrary has not been stipulated, the consorts are presumed to have subjected themselves to the general laws and customs of the country, and particularly to the legal community of property, but this article is subject to article 6, which provides that moveable property is governed by the law of the domicile of the owner, and that persons domiciled out of Lower Canada are, as to their status and capacity, subject to the laws of their country. Even if this were not expressed, it is clear that the Legislature of Quebec could not have intended to alter the international law of domicile. Much confusion has arisen from the use of the word domicile in two different senses. Sir Robert Phillimore, in his work on the Law of Domicile, page 17, remarked, and in their Lordships' opinion correctly so, that "it might have been more correct to have limited the use of the word domicile to that which was the principal domicile, and to have designated simply as residences the other kinds of domicile; but a contrary practice has prevailed, and the neglect to distinguish between the different subjects to which the law of domicile is applicable has been the chief source of the errors that have occasionally prevailed on this subject." He refers to the *discours* pronounced by M. Malherbe on the introduction of the law of domicile into the Code Civil. "Chaque individu ne peut avoir qu'un domicile quoiqu'il puisse avoir plusieurs résidences;" also to *Mallas v. Mallas*, 1 Robertson's Ecclesiastical Cases, page 75, where it is said, "The gradation from residence to domicile consists both of circumstances and intention."

Article 79 of the Civil Code of Lower Canada speaks of the domicile of a person for all civil purposes, and article 63 of a domicile for the purpose of marriage. The latter article is as follows:—"The marriage is solemnized at the place of the domicile of one or other of the parties. If solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties. For the purposes of marriage, domicile is established by a residence of six months in the same place." The words "for the purposes of marriage" refer to the previous portion of the article, and mean for the purpose of the solemnization of the marriage. The Legislature never could have intended to enact by such expressions as these that no person should be married in Quebec unless he should have his international domicile there; still less could it have intended to alter the international law of domicile, and to enact that any person having his international domicile elsewhere should, by a temporary residence in Quebec for six months for the purpose of having his marriage solemnized there, lose his international domicile and acquire a new inter-

MARRIAGE IN THE PROVINCE OF QUEBEC.

national domicile by election, so as to affect his status and civil rights.

Article 1260 speaks of the general laws and customs of the country. The *acte de mariage* does not say that Wadsworth was of the Province of Quebec or Lower Canada, the country of which the laws and customs established the community of property on marriage, but merely that he was of the city of Quebec.

There could have been no intention on the part of Wadsworth when he signed the *acte de mariage* describing him as of the city of Quebec, laborer, to mislead or induce his wife to believe that by the marriage she would acquire community of property, for he was a mere day laborer, and she was a partner in the firm by which he was employed, and there was no probability at that time that he would acquire the large property of which he died possessed. The argument of Mr. Justice Taschereau as regards contract, guarantee, fraud, or misrepresentation on the part of Wadsworth is not based upon any solid foundation. In fact, the *acte de mariage* was signed after the marriage had been solemnized, in accordance with the provisions of articles 64 and 65 of the Civil Code.

It was not drawn up by Wadsworth, though it was signed by him, and the words "de cette ville" were probably introduced from a previous representation made by him, in order to obtain the solemnization of his marriage, that he had resided six months in the city. It is clear that the question of international domicile is one of general law, and that the doctrine of the Roman law still holds good, that "It is not by naked assertion but by deeds and acts that a domicile is established." It certainly cannot be said that the case involves an intricate question of international law (to use the words of Mr. Justice Taschereau) if it depends upon whether Wadsworth contracted with his wife or was guilty of a fraudulent misrepresentation.

Their Lordships are of opinion that the word domicile in article 63 was used in the sense of residence, and did not refer to international domicile. They are of opinion that a person having resided temporarily six months in Quebec would be entitled to have his marriage solemnized in that city, although he might be internationally domiciled elsewhere and might refuse to change that domicile. It would be monstrous to suppose that an Englishman, Frenchman or American travelling in Lower Canada, and retaining his domicile in his own country, could not be married in Quebec after a temporary residence there for six months without abandoning his international domicile in his own country, and altering his status and civil rights.

ONUS PROBANDI. See EVIDENCE: *iisdem verbis*.

WHAT CONSTITUTES.

BEAUCÉ V. MUTER¹

41. Domicile must be *de facto*, not *de jure*. Therefore, the fact of a party being resident in France, but represented by an attorney in the Island of Saint Lucia, will not create

¹ Saint Lucia, 1845 Jan. 17, V Moore 69.

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a constructive domicile, so as to entitle a party to set up as a discharge to a mortgage, a plea of prescription of ten years *entre presents*.

ANDERSON V. LANEUVILLE¹

42. Domicile is established by residence showing an intention of perpetual establishment. A man born and brought up in Ireland, came to reside in England and acquired there an English domicile. He afterwards sold his house and furniture and went to reside in France, where he bought and furnished a house in which he resided permanently with the exception only of occasional visits of short duration to England for purposes of business relating to his estates in Ireland, and his property in the English funds. Under such circumstances, the Judicial Committee held, that the testator's domicile was French and was not affected by his having expressed an intention to return to England, in an event which never happened, or of his having, on one occasion when in England, executed a will according to the English form and law, or from the circumstance that the bulk of his property at his death was in the English funds.

THE RIGHT HON. DR. LUSHINGTON, p. 335:—For what is it that prevents the acquisition of a domicile by long residence in a country? It is the fact of the individual being there for a temporary purpose. It never can be said that residing in a country until the death of an individual is a residence merely for a temporary purpose. A residence in India, in the East India Company's service, has long since been established to constitute a domicile, yet, in such a case, there is always an *animus revertendi* at some period, though the period may be remote, and very uncertain. In order to prevent the acquisition of a domicile by residence in another country, it is laid down in all the books, that if the residence be merely for a purpose which, in its nature, is temporary, and not likely to last long, then the residence would not constitute in itself the acquisition of a domicile.

HODGSON V. DE BEAUCHESNE²

43. The presumption of law is against the intention to abandon the domicile of origin.

44. Length of residence in a foreign country, according to time and circumstances, raises *per se* a presumption of intention to abandon the domicile of origin, and to acquire a new domicile; but such presumption may be rebutted by facts showing that there was no such intention.

¹ Canterbury, 1854 Nov. 30, IX Moore 325.

² Canterbury, July 14, XII Moore 285.

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45. A change of domicile is not to be inferred from the fact of a lengthened residence in a foreign country. To constitute a change of domicile, it must be *animo et facto*.

THE RIGHT HON. DR. LUSHINGTON, p. 313:—The question of domicile has now, for nearly a hundred years, been much discussed in our courts, and there are numerous authorities upon the subject. Various attempts, too, and from an earlier period, have been made by Institutional writers to arrive at a definition of domicile. The attention of foreign jurists was directed to similar inquiries long before the question arose in *England*, and the reason appears to have been, that a change of residence on the continent, the removal from one state to another, and from one province to another within the same state, where the laws were different, especially the law of succession, was more frequent. Such was the case with regard to the Dutch Provinces, and, more or less, as to *France* and the other continental States.

Various meanings have been affixed to the word "domicile": domicile, *jure gentium*, domicile by the municipal law of any country, and we may add, domicile during war, as it may govern the rights of belligerent States. This species of domicile, it is true, is in one sense a domicile, *jure gentium*, but in many particulars it is governed by very different considerations, and decisions belonging to it must be applied with great caution to questions of domicile independent of war

All the writers on this subject, and very many Judges, have declared that the intention of the person whose domicile is in question, is a matter of the greatest importance in order to arrive at a just conclusion.

Intention must, in a considerable degree be inferred from circumstances.....

P. 328:—We concur in the opinion that great weight is to be attributed to length of residence, but we think that other matters must necessarily be taken into consideration. Independent of special circumstances peculiar to the individual, as, for instance, being a Peer of Parliament, we apprehend that all the authorities show that the intention to abandon the domicile of origin and acquire another is a most important and indispensable ingredient in forming a judgment upon these questions.

In *Munro v. Munro* (7 Cl. & Fin. 877), Lord Cottenham said: "To effect this abandonment of the domicile of origin, and substitute another in its place, it required *le concours de la volonté et du fait, animo et facto*: that is, the choice of a place; actual residence in the place then chosen, and that it should be the principal and permanent residence; the spot where he had placed *larum rerumque ac fortunarum suarum summam*; in fact, there must be both residence and intention. Residence alone has no effect *per se*, though it may be most important as a ground from which to infer intention. Mr. Burge (1 Comm. on Col. & For. laws, 54), in his excellent work, cites many authorities from the civilians to establish this proposition.

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In *Collier v. Rivaz* (2 Curt. Ecc. Rep. 857), Sir Herbert Jenner *Fust* said: "Length of time will not alone do it, intention alone will not do; but the two taken together, do constitute a change of domicile. In *Munro v. Douglass* (5 Madd. 405), Sir John Leach observed: "A domicile cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto*." It was clearly the opinion of that learned Judge that, to constitute domicile, intention and residence must concur. *Denizart*, Tome I. Tit. "Domicile," quotes authority to the same effect, that neither the intention without the fact, nor the fact without the intention, can create a domicile.

We think that length of residence, according to its time and circumstances, raises the presumption of intention to acquire domicile. The residence may be such, so long and so continuous, as to raise a presumption nearly, if not quite, amounting to a *præsumptio juris et de jure*; a presumption not to be rebutted by declarations of intention or otherwise than by actual removal. Such was the case of *Stanley v. Bernes*. The foundation of that decision, in this respect, was, that a Portuguese domicile had been acquired by previous residence and acts, and that mere declarations of intention to return could not be sufficient to prove an intention not to acquire a Portuguese domicile.

In short, length of residence *per se*, raises a presumption of intention to abandon a former domicile, but a presumption which may, according to circumstances, be rebutted.

It would be a dangerous doctrine to hold, that mere residence, apart from the consideration of circumstances, constitutes a change of domicile. A question which no one could settle would immediately arise, namely, what length of residence should produce such consequence. It is evident that time alone cannot be the only criterion. There are many cases in which a very short residence would constitute domicile, as in the case of an emigrant, who having wound up all his affairs in the county of his origin, departs with his wife and family to a foreign land and settles there. In a case like that, a residence for a very brief period would work a change of domicile.

Take a contrary case, where a man, for business or pleasure, or mere love of change, is long resident abroad, occasionally returning to the country of his origin, and maintaining all his natural connections with that country; the time of residence would not to the same extent, or in the same degree, be proof of a change of domicile.

We concur, therefore, in the doctrine held in many previous cases, that to constitute a change of domicile, there must be residence, and also an intention to change.

PLATT V. ATTORNEY GENERAL OF NEW SOUTH WALES ¹

46. Residence is a material element in establishing the domicile of a man, especially if such residence is the principal one where the wife and children are living, but it must be a residence freely chosen, and not one imposed by duty or by circumstances.

¹ New South Wales, 1878 L. R. III Appeal Cases 336.

DOMICILE

WHAT CONSTITUTES.

SIR BARNES PEACOCK, p. 342: — Lord *Westbury*, in the case of *Udny v. Udny*¹ says: "Domicile of choice is a conclusion or inference which the law draws from the fact of a man fixing voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by an external necessity, such as the duty of office, the demands of creditors, or the relief from illness, and it must be residence fixed not for a limited period or particular purpose but general and indefinite in its future contemplation.. .."

"It is true that residence originally temporary or intended for a limited period may afterwards become general and unlimited, and in such a case so soon as the change of purpose or *animus manendi* can be inferred, the fact of domicile is established."

P. 343. It is always material in determining what is a man's domicile to consider where his wife and children live and have their permanent place of residence and where his establishment is kept up.

ABD-UL-MESSIH V. FABRA²

47. Domicile is the relation which the law creates between a particular locality and an individual; it must be territorial, and cannot be personal.

LORD WATSON, p. 439: — The idea of a domicile, independent of locality, and arising simply from membership of a privileged society, is not reconcilable with any of the numerous definitions of domicile to be found in the books. In most, if not all of these, from the Roman code (10, 39, 7) to Story's Conflict (741), domicile is defined as a locality, or the place where a man has his principal establishment and true home. Probably Lord *Westbury* was more precisely accurate, when he stated, in *Bell v. Kennedy*³ that domicile is not mere residence, "it is the relation which the law creates between an individual and a particular locality or country." The same learned Lord, in *Udny v. Udny*⁴ speaking of the acquisition of a residential domicile, said: "Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time." According to English law, the conclusion or inference is, that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity, upon which his majority or minority, his succession, and testacy or intestacy must depend. But the law which thus regulates his personal status must be that of the governing power in

1 L. R. I Appeal Cases 458.

2 Constantinople, 1888 March 17, L. R. XIII Appeal Cases 431.

3 L. R. 1 H. L. S. 320.

4 L. R. 1 H. L. S. 458.

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whose dominions he resides; and residence in a foreign country, without subjection to its municipal laws and customs, is therefore ineffectual to create a new domicile.

DONATION

See GIFT.

DONS MANUELS

See EVIDENCE.

DRAFT

See BILL OF EXCHANGE.

DROIT D'AUBAINE**ALIENS.****DONEGANI V. DONEGANI ¹**

48. The *droit d'aubaine* became the law of Lower Canada, with regard to aliens, when the ancient French law was established there by the 14 Geo. III, cap. 83.

SIR LANCELOT SHADWELL, Vice-Chancellor, p. 82: —That the law of France was, in general, the law of Canada, as one of her colonies, before its cession to the English, cannot be disputed. It appears from the edicts of Louis XIV, published in March and April 1663, that after the company of Canada had ceded to the French king the colony of New France, called Canada, Louis XIV appointed a Sovereign Council in Canada, giving them power "pour y juger souverainement et en dernier ressort selon les lois et ordonnances de notre royaume."

Edits concernant le Canada, tom. 4, Québec 1803, p. 21-23.

But it is said the *droit d'aubaine* was no part of the French colonial law; and to prove this, a passage from Pothier was quoted, *Traité des Personnes*, partie I, tit. II, vol. 8, p. 27; Paris, 1827: "La nécessité de peupler nos colonies a engagé nos rois à naturaliser tous les étrangers qui s'y transporteraient dans la résolution d'y former un établissement fixe et durable;" and it is said that this passage, when taken in connexion with the paragraph immediately preceding it, shows that all strangers in the French colonies were naturalized generally, and, as of course, without the grant of letters of naturalization to individuals from time to time.

But that this is not the true construction of the phrase, "a engagé nos rois," is evident from the edict of October 1727, tit. 6, art. I: "Les étrangers établis dans nos colonies, même ceux naturalisés ou qui pourront l'être à l'avenir." Edits concernant le Canada, p. 475; and a similar expression occurs in the 3rd article, "autres personnes qui soient étrangers encore, qu'ils soient naturalisés."

Edict of August 1717, 23rd article; Edits concernant le Canada, p. 37; Edits 1664; Denisard, 4e édition, Paris, 1784, titre: colonies françaises, s. 2, § 8.

Their Lordships are of opinion that nothing advanced by the appellant's counsel has shown that the general law of France, includ-

¹ Lower Canada, 1882 Feb. 20, III Knapp 63.

ALIENS.

ing the *droit d'aubaine*, was not the law of Canada at the time it was ceded to the English; and whatever might have been the effect of the proclamation of the 7th of October 1763, there can be no doubt that since the Act of 14 Geo. 3, s. 83, Canadian law, that is, the old French law, including the *droit d'aubaine*, has been the law that governed Lower Canada. *See ALIENS: legal status of aliens in France.*

DUTY

See CUSTOMS, WILL: succession duty.

E

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EASEMENT

See SERVITUDE.

ENTRY

See CUSTOMS.

ERROR

See EVIDENCE, CONTRACT, JUDICIAL COMMITTEE: *power to rectify errors in judgment.*

ESCHEAT

ORIGIN OF

1. Origin of the property in land, tenure and of escheat in England, and its introduction in Canada. See LEGISLATURE: *distribution of legislative powers, Attorney General of Ontario v. Mercer.*

EVIDENCE

ABANDONMENT OF WILL FROM LAPSE OF TIME.

CASTLE v. TORRE ¹

2. Evidence to rebut the presumption of abandonment arising from the lapse of time from the making of a will to the death of the testator, may be collected from express declarations of the testator, as well as the general circumstances of the case, and the degree of evidence requisite will be proportioned to the deficiency of internal evidence afforded by the perusal of the document itself.

MR. JUSTICE BOSANQUET, p. 159:—We have next to consider the nature of the extrinsic evidence necessary to rebut the presumption of abandonment, arising from the lapse of time, from the making of the instrument to the death of the maker, and the sufficiency of the evidence adduced.

Evidence to rebut this presumption may be collected, not only from express declarations of the testator, but from all the circumstances of the case; and the degree of evidence requisite will be proportioned to the deficiency of internal evidence afforded by the perusal of the document itself.

“The presumption is against an imperfect paper, and the burden of proof against the party setting it up; but the degree of presumption varies according to the state of imperfection in which the paper presents itself. In some instances it is so completely a memorandum, that proof of intention cannot be made but by strong extrinsic

¹ Canterbury, 1837 Dec. 16, 11 Moore 133.

ABANDONMENT OF WILL FROM LAPSE OF TIME.

circumstances; in other cases it is so nearly perfect, it has on the face of it such strong indications of testamentary intention, that slight circumstances are sufficient to outweigh the presumption against it." (')

It has already been observed, that the paper does not appear, when written, to have been intended as the codicil contemplated; but that, nevertheless, it contained the fixed expression of Lord Scarborough's wishes.

As a codicil, it was imperfect, but as a paper of instructions it was complete.

To ascertain whether it was abandoned or adhered to, the first thing to be inquired after, is the custody or place in which it was found; whether it was carefully preserved or neglected, or found among the papers of no value, or which had become useless.

ALIENS.**DONEGANI V. DONEGANI ²**

3. The question who is an alien in the Province of Quebec must be decided according to the laws of England, but, when alienage is established, the consequences which result from it must follow the French law.

APPRECIATION OF**BLACHFORD V. CHRISTIAN ³**

4. False statements on indifferent as well as on material thing always throws discredit on the party making them.

LORD WYNFORD, p. 81:—False statements are evidence of fraud, even although what is falsely stated may be immaterial. The parties must have thought it material to make such false statements; for although persons are sometimes weak enough to state falsehoods, they are not foolish enough to do so except when they think that they may thereby advance their interest. Whenever parties are detected in such falsehoods, you have no security that anything alleged by them is true.

RAJA ROW VENCATA V. ENOOGOONTY SOORIAH ⁴

5. When the judgment brought in appeal is upon questions of fact only, the Judicial Committee will be reluctant to reverse the decision of the court below, unless some test is discovered showing safely and satisfactorily that the truth of the evidence can be estimated in a manner different from that which the court below has adopted.

CHIEF JUSTICE OF THE COURT OF BANKRUPTCY, p. 260:—The only question decided by the courts abroad in this case was a question of

¹ Forbes v. Gordon, 3 Phill. 528.

² Lower Canada, 1835 Feb. 20, III Knapp 63.

³ Isle of Man, 1829 July 3, I Knapp 73.

⁴ Madras, 1834 Feb. 11, II Knapp 259.

APPRECIATION OF

fact, depending upon the credit due to the oral testimony of witnesses directly contradicting each other as to facts within their personal observation and knowledge.

In such a case, it is obvious that the court before which the witnesses are examined, and which has the opportunity of observing their demeanour, is the best qualified to judge of their veracity. When such a question, therefore, has been fully heard, and impartially decided, the safest course must be to abide by the decision of the court below, unless among the circumstances of the case, some test can be discovered, by which the truth of the evidence can be safely and satisfactorily estimated.

BABOO ULRUCK SING V. BENY PERSAD ¹

6. When the court below has decided a case depending upon questions of facts alone, the Judicial Committee will not advise a reversal of their judgment, unless there appears some clear distinct point in which they are wrong, although doubts may be entertained as to its correctness.

BELLINGHAM V. FREER ²

7. The concurrence of the two courts below on a matter of fact, as on a matter of foreign law, has great weight on the opinion of their Lordships, who would require a very strong case of mischief to reverse them.

HON. THOMAS ERSKINE, p. 342:—When two courts have concurred in a conclusion of fact, from the evidence before them, or sitting in a part of the King's foreign dominions, have concurred in a matter of foreign law in force there, a court of appeal in this country ought to be fully satisfied that their decision is erroneous before it pronounces a judgment of reversal.

RAWCHUM MULICK V. LUCHMEECHUND RADAKISSEN ³

8. The doctrine enunciated in the above cases was maintained and acted upon in this cause.

MR. BARON PARKE, p. 67:—Indeed, we should not have reversed their judgment on a matter of fact, unless we were quite satisfied they were wrong, their knowledge of local circumstances, and the character and appearance of the witnesses, enabling them to form a more correct opinion than a tribunal of appeal in this country possibly could. But in our opinion, they drew a proper inference from the evidence in the case.

GANN V. BRUN, THE "CLARISSE" ⁴

9. A court of Appeal, in a disputed question respecting the *quantum* to be awarded by the court below for salvage ser-

¹ Bengal, 1834 Feb. 11, II Knapp 265.

² Lower Canada, 1837 May 16, I Moore 342.

³ Calcutta, 1854 Feb. 15, IX Moore 46.

⁴ Admiralty of the Cinque Ports, 1856 July 4, XII Moore 340.

APPRECIATION OF

vices, is indisposed, except if it appears that the judgment is clearly erroneous, to interfere with the compensation which the court below, in its discretion, has awarded.

THE LORD JUSTICE KNIGHT BRUCE, p. 344:—Considering the distress and danger in which the vessel was placed, and the meritorious nature, so far as the salvors were concerned, of the services rendered, their Lordships would, in all probability, had the case come originally before them, have been disposed to allow a greater amount of total remuneration. It is, however, a settled rule, and one of great utility, particularly with reference to cases of this description, that the difference ought to be very considerable to induce a Court of Appeal to interfere upon a question of mere discretion.

GREENE V BAILEY, THE "NEPTUNE" ¹

10. The same doctrine as in *Gann v. Brun*, The "*Clarisse*," mentioned above, was applied in this cause where a diminution of the amount of compensation awarded for salvage services was sought.

THE RIGHT HON. T. PEMBERTON LEIGH, p. 350:—It is important to adhere strictly to the rule laid down in this Court in the case of the "*Clarisse*." The same rule must apply in diminishing the amount of compensation which is applied in increasing it, and where the court below appears to have been fully in possession of all the facts and to have understood those facts accurately at the time the judgment was pronounced, and where, therefore, the amount awarded was one of mere discretion, their Lordships would not, except in a case of very extraordinary character, interfere with the manner in which that discretion was exercised.

THE NORTH GERMAN LLOYD STEAMSHIP COMPANY V. ELDER,
THE "SEHWALBE" ²

11. Where evidence is conflicting, the appellate court, in order to advise a reversal of the judgment appealed from, must not merely doubt whether the judgment appealed from is correct, but must be satisfied that it is wrong.

BLAND V. ROSS, THE "JULIA" ³

12. Where disputed facts, involving nautical questions, are raised by an appeal from the Admiralty court, as in the case of a collision, this court will not reverse the decree appealed from, unless it be conclusively satisfied that the decree is wrong, even though the court may entertain doubts as to the finding of the Admiralty court.

¹ Admiralty, 1858 July 9, XII Moore 346.

² Admiralty, 1860 Dec. 14, XIV Moore 241.

³ Admiralty, 1860 Dec. 13, XIV Moore 210.

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LORD KINGSDOWN, p. 235:—They who require this Board, under such circumstances, to reverse a decision of the Court below, upon a point of this description, undertake a task of great and almost insuperable difficulty. In all cases, as we have frequently observed, we must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong. And when a controversy arises upon facts of the nature of that now in question, there are some peculiarities in the jurisdiction which we are now exercising deserving of attention.

In a Court of Law, if the judges are dissatisfied with a verdict as against the weight of evidence, they can send the case before another jury. In the Court of Chancery, when the Court of Appeal reverses the judgment of the Inferior Court on the result of evidence, the judges of the Appellate Court are as capable as the judge below (and, indeed, are presumed to be more capable) of forming an opinion for themselves, as to the proof of facts and as to the inferences to be drawn from them.

But in these cases of appeal from the Admiralty Court, when the question is one of seamanship, when it is necessary to determine, not only what was done or omitted, but what would be the effect of what was done or omitted, and how far, under the circumstances, the course pursued was proper or improper, their Lordships can have but slender means of forming an opinion for themselves, and certainly cannot have better means of forming an opinion than the judge of the Admiralty Court. They do not speak with reference to the distinguished person who now fills, and has so long filled, that office, though it would be impossible to imagine a stronger example of the truth of the remark; but any judge who sits from day to day on such cases must necessarily acquire a knowledge and experience to which ordinary members of this Board cannot pretend. They must in such cases act entirely upon the advice of the nautical assessors, who form no part of the court, whose opinion they can regard only as they might regard the advice of any nautical men out of court.

THE GENERAL IRON SCREW COMPANY V. MOSS,
THE "ARAXES" AND THE "BLACK PRINCE" ¹

13. The principles laid down in the above case, *The "Julia,"* affirmed.

THE "CHETAH" ²

14. The Judicial Committee though unwilling to interfere with the discretion exercised by the judge of the court below in questions of salvage, either by increasing or diminishing the sum awarded, will, nevertheless, when, in their judgment, there has been excess in the amount, or the sum awarded is manifestly insufficient, exercise their own

¹ Admiralty, 1861 July 11, XV Moore 122.

² Admiralty, 1868 Nov. 26, V Moore N. S. 273.

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judgment as to the proper remuneration to be awarded and apportioned among the salvors. In this cause their Lordships reduced the sum awarded by more than one half.

THE "ALICE" AND THE "PRINCESS ALICE"¹

15. The principle of non-interference with the discretion of the court below in matters of fact was again maintained. But their Lordships will not consider it as a general rule, as there are cases in which the Judicial Committee may be bound to interfere.

THE LORD JUSTICE PAGE WOOD, p. 336:—If this Board finds that in the Court below there was a clear and distinct evidence upon the one side, and possibly evidence which the appellant might think to be as clear and distinct on the other side, nevertheless, if the judge in the Court below, in his discretion, having the opportunity of seeing the witnesses and observing their demeanour, has come, on the balance of testimony, to a clear and decisive conclusion, those who undertake to reverse that conclusion, on the ground that the judge has erred in giving credence to the one class of witnesses rather than to the other, undertake, as expressed in the case of The "*Julia*," an almost impossible task. This Committee has no opportunity of seeing the witnesses, of considering in what respect credence should be given to one class rather than the other from the mode in which their evidence has been given; and it would have to perform a duty of a most painful character if it were not merely to reverse the decision of the judge below with reference to the finding that he has come to adverse to the appellant, but had, in such a state of circumstances, to do that which would be a necessary corollary from such a step, viz., to give a deliberate judgment in favour of the respondent, without the same means of ascertaining the real truth as was possessed by the judge of the Court below. Now, it is of course not wise at any time to lay down rules of such extreme accuracy of definition as would induce a Court of Appeal to hold itself bound upon any future occasion to a fixed and determined line which cannot be overpassed on the one side or the other. We have had to consider that question on a different subject matter in the course of this very day, with reference to the course taken by this Committee as to the augmentation or diminution of the amount awarded in salvage cases.² A useful line has been drawn by that case with reference to our proceedings in such a case as this, viz., that it requires a case of extreme and overwhelming pressure to induce this Committee to vary from the decision of the Court below as to the amount of damage with reference to salvage. Still such a case may occur; this Committee has only recently so decided in a similar case.³ It is just possible to suppose that other cases might occur with reference to this very question of evidence, and it

¹ Admiralty, 1868 Nov. 30, V Moore N. S. 333.

² The "*Chetah*." See the preceding case.

³ The "*Calaba*." See MERCHANT SHIPPING.

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might be possible to show that the judge below had so plainly, manifestly and clearly erred upon the face of the evidence that we ought to reverse his judgment.

THE "ENGLAND" ¹

16. The Judicial Committee again refused to interfere with the discretion of the court below in adjudicating upon a question of fact.

AUTHENTIC WRITINGS.

NYE V. MACDONALD ²

17. In a petitory action brought in the Superior court, in the province of Quebec, to recover land, the plaintiff filed in the record as evidence, a deed of sale made before a public notary in the province of Ontario. The courts in the province of Quebec refused to give effect to the signature of the notary in the absence of proof of identity of the parties named in the deed, and dismissed the plaintiff's action.

18. Although by the French law the deed signed by a public notary, in the province of Quebec, is sufficient evidence before the courts of that province of its contents, the certificate of a public notary in the province of Ontario, where the English law prevails, will not be received *per se* as proof of the due execution of an instrument or of the identity of the parties; such fact must be proved by evidence as required in England.

LORD CAIRNS, p. 150: — A notary public in the province of Upper Canada, a province regulated by English law, has no power, by English law, to certify to the execution of a deed in such a way as to make his certificate evidence, without more, that the deed was executed, and that it was attested in the manner in which the deed professes to be attested.

According to the law of England, the mere production of the certificate of a notary public stating that a deed had been executed before him would not in any way dispense with the proper evidence of the execution of the deed. The circumstance that by French law a French notary public has a greater power, and that his certificate has a greater validity, does not appear to their Lordships to carry a power to the act of the English notary upon English soil, so that that act when brought into question upon French soil should have the effect given to it there which is given by the law of France to the act of a French public notary. The circumstance that an officer is called in France a public notary, with certain powers assigned to him by French law, and that in England there is also an officer called a notary public, with much more limited powers assigned to him by English law, would not in any way make the act of the

¹ Admiralty, 1863 Nov. 26, V Moore N. S. 344.

² Quebec, 1870 July 19, VII Moore N. S. 134.

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English notary public, when it is called into question in France, have the effect which it would have had if it had been an act done by a French notary public upon French soil.

COMMENCEMENT DE PREUVE PAR ÉCRIT.PRICE v. NEAULT¹

19. A *commencement de preuve par écrit* must be some written evidence which lends *probabilité* to that which is sought to be proved by oral evidence.

CREDIBILITY OF WITNESSESJANVRIN v. DE LA MARE²

20. The credibility of a witness may be attacked on the ground of enmity, but if a long delay of peace has elapsed since the enmity commenced, very slight evidence will rebut it.

LORD KINGSDOWN, p. 349:—The strength of the presumption, and the evidence by which it must be encountered, must necessarily depend on the nature of the enmity, the cause out of which it has arisen, and so on.

If a quarrel takes place on a particular day between two persons, and nothing further appears, it may not be unreasonable to suppose that the feelings which occasioned it, or grew out of it, have ceased after twelve months. But, if the enmity has arisen from a serious cause—an attack (to use the language of some of the books) on the life, the honor, or the fortune of a man, and the injury still continues, and nothing appears to have occurred likely to produce a reconciliation, the presumption would seem to be the other way. At all events, very slight evidence would be sufficient to rebut the legal presumption if it applies to such a case.

THE "AGRA" and "ELIZABETH JENKINS"³

21. Courts of justice should watch and reprobate carefully any attempt to warp the evidence of a witness by communication between him and either of the litigating parties; but the evidence of such witness should not be entirely thrown aside, merely on the ground of such communication.

SANTACANA v. ARDEVAL⁴

22. The point raised in this appeal was that the court below had discredited a witness favourable to the appellant, and who would have sustained his case. Their Lordships held that they would not reverse a judgment on such

¹ Quebec, 1886 Dec. 1, L. R. XII Appeal Cases 110.

² Jersey, 1861 Feb. 16, XIV Moore 334.

³ Admiralty, 1867 July 8, IV Moore N. S. 442.

⁴ Gibraltar, 1830 May 8, 1 Knapp 269.

CREDIBILITY OF WITNESSES.

ground, the court below being in a better position to judge the question of credibility of the witnesses than the Privy Council.

SIR JOHN LEACH, MASTER OF THE ROLLS, p. 270: — Their Lordships are of opinion that they ought to decide this question upon general principle, and not upon a mere point of form. The Court below proceeded on the ground that they discredited the witnesses on the part of the appellant. This Board never heard of an appeal having been instituted on the ground that witnesses had been discredited; the Court below were aware of the character of those witnesses; and besides the knowledge of their character had the advantage of seeing their demeanor and behavior, of which we on written evidence have no power of judging. We feel it our duty, therefore, to decide this case on the general principle, that no appeal will lie from the judgment of a Court below on the ground that the court discredited the witnesses produced to them by either party.

CANEPA V. LARIOS ¹

23. The principle that no judgment should be reversed on the ground that the court below has improperly discredited witnesses is not a general rule; there may be cases in which their Lordships may think fit to exercise their discretion in the interest of justice.

LORE WYNFORD, p. 283: —The rule laid down in the case of "Santacana v. Ardeval" that no appeal will lie from the judgment of a court, on the ground that the court discredited the witnesses produced to them by either party should be somewhat qualified, or it would prevent us from protecting colonists against the effects of local prejudices, to which jurors, assessors and judges, who reside within a jurisdiction of small extent, and are in constant communication with the inhabitants, are liable. In all cases in which the Court of Appeal sees no urgent reason for saying, that the court in whose presence the evidence was given have taken a wrong view of it, the safest course is to adhere to its determination. But a case may be so unsatisfactory as to require further explanation; so improbable as to be manifestly unworthy of credit; or may exhibit circumstances which should convince any impartial or judicious mind of its truth. In such cases the Court of Appeal should not be concluded by the judgment of the Court below, but exercise its power of sending a case back for further inquiry, with such directions as to that inquiry, as it may think proper to give.

CLARK V. CARTER ²

24. As a general rule, it is manifestly objectionable to reexamine a witness after a release of that which would

¹ Gibraltar, 1834 Feb. 17, II Knapp 276.

² Canterbury, 1843 Feb. 18, IV Moore 207.

CREDIBILITY OF WITNESSES.

have been a valid objection to his competency. But, in every case of this description, the circumstances and the nature of the objections, as to the interest of a witness, must be considered. The witness in this case was allowed to be reexamined.

FORGERYDOE DEN DEVINE V. WILSON & AL.¹

25. There is a great difference with regard to the *onus probandi* in a case of forgery in a civil suit and in a criminal matter. In the first, the one who produces the documents is bound to establish that it is genuine; in the second, the proof of the forgery is upon him who asserts it.

THE RIGHT HON. SIR JOHN PATTESON, p. 531: — Now, there is a great distinction between a civil and a criminal case, when a question of forgery arises. In a civil case the *onus* of proving the genuineness of a deed is cast upon the party who produces it, and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery, or otherwise, the party asserting the deed must satisfy the jury that it is genuine. The jury must weigh the conflicting evidence, consider all the probability of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities. In a criminal case the *onus* of proving the forgery is cast on the prosecutor who asserts it, and unless he can satisfy the jury that the instrument is forged to the exclusion of reasonable doubt, the prisoner must be acquitted.

IN COMMERCIAL CONTRACTS.MCKAY V. RUTHERFORD²

26. A commercial contract which does not come within the Statute of Frauds, may, according to the law of England, be proved by parol evidence, and this was held to apply in the case of a contract between an individual and the government to supply stones for the making of a canal.

27. The Canadian Act, 25th Geo. III, c. 2, sect. 10 (Code Civil art. 1206) passed by the Legislature of Lower Canada, for regulating proceedings in the courts of justice, which enacts that for proof of all facts concerning commercial matters, recourse should be had to the rules of evidence laid down by the laws of *England*, revoked so much of the old French law, which formerly prevailed in the province of Quebec, and the rules of English law as to the admission of parol evidence in commercial matters were substituted for those laid down in the *Ordonnance de Moulins* (1566),

¹ New South Wales, 1855 July 25, X Moore 531.

² Lower Canada, 1848 Dec. 12, VI Moore 413.

IN COMMERCIAL CONTRACTS.

and subsequently altered by the *Ordonnance* of 1637, whereby parol evidence was excluded from the proof of all *contracts*, or matters, exceeding the sum of 100 *livres*, except in certain cases.

IN LIBEL CASES.RAINY V. BRAVO ¹

28. In an action of libel the defamatory words set out in the declaration must be proved as laid, and it is a fatal variance, if the words as alleged are materially qualified by evidence of words not contained in the declaration, although such words as qualified may still be libellous. The defendant, after the publication of a libel and before the action was brought, destroyed the letter containing the libellous words. It was held, that, as the defamatory writing was not in existence, oral evidence of the contents of the letter by witnesses who heard it read was admissible, but that the actual words used as laid in the declaration must be proved, and not the substance or impression the witnesses received of the words, as otherwise the witnesses, and not the court or jury, would be made the judges of what was a libel.

INEVITABLE ACCIDENT.THE "DESPATCH" ²

29. When a collision has occurred, in order to establish a case of inevitable accident, he who alleges it must prove that what occurred was entirely the result of some *vis major*, and that he had neither contributed to it by any previous act or omission, nor when exposed to the influence of the force had been wanting in any effort to counteract it.

LAWS OF FOREIGN STATE.SMITH V. GOULD ET AL., THE "PRINCE GEORGE" ³

30. If reliance is placed upon a difference between the law of England and a foreign state, the party relying upon the difference is bound by witnesses or authorities to prove such fact.

BREMER V. FREEMAN ⁴

31. Foreign law is a matter of fact to be ascertained by the evidence of experts skilled in such law; but when the evidence of the experts is unsatisfactory and conflicting, the

¹ *Sierra Leone*, 1872 June 11, IX Moore N. S. 35.

² *Admiralty*, 1860 July 11, III Law Times N. S. 220.

³ *Admiralty*, 1842 Feb. 19, IV Moore 21.

⁴ *Canterbury*, 1857 March 7, X Moore 306.

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appellate court, not having an opportunity of personally examining the witnesses to ascertain the weight due to each of their opinions, will examine for itself the decisions of the foreign courts and the text writers, in order to arrive at a satisfactory conclusion upon the question of foreign law.

LOCAL USAGE.

KIRCHNER V. VENUS ¹

32. Local usage may be admitted in evidence to affect the construction of contracts, but it may serve one of the parties only in case it is admitted or proven that the other party had a knowledge of such usage. Ignorance in good faith is a good answer in such case.

LORD KINGSDOWN, p. 399 :—The ground upon which it appears to us that this case must be decided in favour of the appellants, is this, that when evidence of the usage of a particular place is admitted, to add to or in any manner to affect the construction of a written contract, it is admitted only on the ground that the parties who made the contract are both cognizant of the usage, and must be presumed to have made their agreement with reference to it. But, no such presumption can arise when one of the parties is ignorant of it.

NEW EVIDENCE.

RAJA ROW VENCATA V. ENVOGOONTY SOORIAH ²

33. The Judicial Committee will not send back a case to a court below for further investigation, on the ground that further evidence might now be produced before it, when the party has had opportunities of bringing forward that evidence below, of which he has not availed himself.

MEIKLEJOHN V. ATTORNEY GENERAL AND CALDWELL ³

34. A testator had made a will bequeathing freehold property, but the will was not signed by the testator at the end of it, and it was attested by no witnesses, and there was no date affixed to it. While the case was pending before the Privy Council, the testator's housekeeper was examined in Canada, and her deposition was sent to England. She deposed that she had seen the testator write the will a few months before his death, that he told her it was his will, and ordered her to lock it up in his escritoir, which she accordingly did.

The appellants were admitted to the benefit of this deposition, under an order of the Judicial Committee.

¹ New South Wales, 1859 Feb. 5, XII Moore 381.

² Madras, 1834 Feb. 11, II Knapp 259.

³ Lower Canada, 1834 June 21, II Knapp 328.

NEW EVIDENCE.

GUIMARAENS V. PRESTON ¹

35. New evidence on the part of the appellant was received by the Judicial Committee at the hearing of this appeal.

HUGHES V. PASCAL ²

36. Evidence not adduced in the court below or forming part of the transcript was allowed to be used on motion made at the hearing of the appeal, subject to all just exceptions.

ANONYMOUS ³

37. In a suit for separation by reason of the wife's adultery, and pending the hearing of the appeal, new facts were alleged to have been discovered. A petition by the wife asking to prove the commission of acts of adultery by the husband, which she only since had been aware of, was granted, and the appeal was suspended.

NORTHCOTE V. DOUGLAS, THE "FRANCISKA" ⁴

38. In matters of international law, where a ship has been seized for breach of blockade, if doubts exist on matter which does not appear upon evidence furnished by the ship itself, namely, the papers on board, or the examination of the master and crew, the existence or non-existence, the sufficiency or insufficiency of a blockade, a Prize Court will allow further proof, and such further proof is not limited to the claimant, but may be granted to the captor also.

THE RIGHT HON. T. PEMBERTON LEIGH, p. 43 :—In everything that regards the ship and cargo the case is to be considered, in the first instance, exclusively upon the evidence furnished by the ship itself, namely the papers on board and the examination on the standing interrogatories of the master and some of the crew. If the case be clear upon this evidence, restitution or condemnation is decreed at once. If upon such evidence the case be left in doubt, further proof is usually allowed to the claimant only, but it may also be allowed to the captors, if, in the opinion of the judge who hears the case, such a course appears to be required. With respect to matters which cannot appear upon evidence furnished by the ship, as the existence or non-existence, the sufficiency or insufficiency, of a blockade, the Court must necessarily resort to other means of information.

¹ Admiralty, 1842 July 13, IV Moore 167.

² Gibraltar, 1842 June 20, IV Moore 41.

³ Canterbury, 1855 March 20, IX Moore 434.

⁴ Admiralty, 1855 August 1, X Moore 87.

NEW EVIDENCE.

THE QUEEN V. HILDEBRANDT, THE "ALINE AND FANNY" ¹

39. According to the principles of the law of Prize, the proof required to acquit or condemn the ship must, in the first instance, come from the ship's papers and the primary depositions of the master and crew. And the captors are not, except under circumstances of suspicion arising from the primary evidence, entitled to adduce any intrinsic evidence in opposition.

40. In a case where no suspicion of an intention to break a blockade appeared from the ship's papers, or the primary depositions, the Judicial Committee refused the admission of further proof by the captors to contradict the depositions with respect to the place of capture.

FALLE V. LE SUEUR AND LE HUQUET ²

41. The Royal court of Jersey having refused to hear witnesses tendered by a defendant in support of one of his pleas, and great delay having occurred from the course pursued, the Judicial Committee, under the powers of the statute, 3rd and 4th Will. IV, ch. 41, sec. 7, appointed a special examiner to take further evidence in the Island, confining his inquiry to certain facts, and directing him to report the same within a limited time; the appeal to stand over for the production of his report and to be argued with reference only to the effect produced upon the entire case by such additional evidence.

HASKING V. TERRY ³

42. Their Lordships explained the rules established with respect to bills of review for new evidence as follows:

THE RIGHT HON. LORD KINGSDOWN, p. 503:—The party who applies for permission to file a bill of review, on the ground of having discovered new evidence, must show that the matter so discovered has come to the knowledge of himself and of his agent for the first time since the period at which he could have made use of it in the suit, and that it could not, with reasonable diligence, have been discovered sooner; and secondly, that it is of such a character that, if it had been brought forward in the suit, it might probably have altered the judgment.

ONUS PROBANDI IN COLLISION CASES.

MORGAN V. SIM, THE "LONDON" ⁴

43. The *onus probandi* in an action of damages for collision lies on the plaintiff who seeks compensation, and he must

¹ Admiralty, 1856 July 10, X Moore 491.

² Jersey, 1859 June 33, XII Moore 501.

³ New South Wales, 1862 July 12, XV Moore 493.

⁴ Admiralty, 1857 Dec. 15, XI Moore 307.

ONUS PROBANDI IN COLLISION CASES.

establish that the loss was the consequence of the neglect or default of the defendant, or else he cannot recover. There is no question or doubt about the law, the burden of proof is clearly upon him.

THE "MARPESIA" ¹

44. Where in a case of damages for collision the defendant pleads inevitable accident, the plaintiff, nevertheless, is bound to make his case, and it is only after the plaintiff has made a *prima facie* case of negligence and want of due care, that the defendant is put to his evidence on his special plea.

ONUS PROBANDI IN CHANGE OF DOMICILE.

HODGSON V. DE BEAUCHESNE ²

45. The *onus probandi* is upon the party who alleges the change of domicile, the presumption of the law being in favor of the domicile of origin and against the abandonment of it to acquire a new domicile in a foreign state.

THE RIGHT HON. DR. LUSHINGTON, p. 325 :—With respect to verbal declarations made to witnesses who depose thereto, no doubt such declarations are admissible evidence in these questions of domicile; but the weight to be attributed to them entirely depends on circumstances, especially the time which has elapsed since they were made; and the circumstances under which they were made. To entitle such declarations to any weight, the court must be satisfied not only of the veracity of the witnesses who depose to such declarations, but of the accuracy of their memory, and that the declarations contain a real expression of the intention of the deceased. Such evidence, though admissible, has been considered by many authorities as the lowest species of evidence, especially when, as in this case, encountered by conflicting declarations.

ONUS PROBANDI IN CRIMINAL MATTERS.

DIOMISSIS V. THE QUEEN, THE "LAURA" ³

46. The general rule in criminal offences is to lay the burden of proof on him who alleges the violation of the law

LORD TURNER, p. 186 :—To be in any way concerned in the Slave Trade is a highly criminal offence and the laws for the suppression of the trade are of a very penal character, affecting both the persons and the property of those who venture to embark in so nefarious a traffic. The proof of the infringement of these laws must, therefore, rest upon those who allege that they have been infringed. This is the rule of law which applies universally to cases of criminal offences, and there is no exception to this rule in cases of offences against the

¹ Admiralty, 1872 Feb. 15, VIII Moore N. S. 468.

² Canterbury, 1858 July 24, XII Moore 285.

³ V. A. Antigua, 1865 March 15, III Moore N. S. 181.

ONUS PROBANDI IN CRIMINAL MATTERS.

laws for the suppression of the slave trade. Offences against these laws may no doubt be established, as offences against other laws may be established, by circumstantial evidence; but the circumstances brought forward to establish the offence must be such as do not end in suspicion merely. They must be such as to satisfy a reasonable mind that the suspicion is well founded, and that the offence has been committed.

ONUS PROBANDI IN CLAIMS FOR HARBOUR DUES.

ROLET V. THE QUEEN ¹

47. Where goods were unshipped in the immediate precincts of the harbour, the *onus* of proving that the vessel was not actually within the harbour, lies on the party claiming exemption from harbour dues.

ONUS PROBANDI IN VOIDABLE CONTRACTS.

MELBOURNE BANKING CORPORATION V. BROUGHAM ²

48. In a suit by an insolvent, who had obtained a certificate of discharge, against the appellants alleging that his assignee had given them a release of the equity of redemption of an immoveable mortgaged in their favour under misrepresentation and mutual error, and praying that the said deed of release might be set aside.

Held that the respondent was *prima facie* bound by his assignee and the *onus probandi* was upon him to establish the misrepresentation and error; and that the evidence in the case did not prove those allegations. *Knight v. Marjoribanks*, 2 Mac. & G. 10.

PAROL EVIDENCE IN DONS MANUELS.

RICHER V. VOYER ³

49. Parol evidence is admissible to prove *dons manuels*.

SIR MONTAGUE E. SMITH, p. 478:—It seems to their Lordships that the parol testimony of witnesses is, of necessity, admissible to prove the agreement in certain cases coming within the class of "*dons manuels*," since it would be incompatible with the law, which allows such gifts to be made by verbal agreement, to exclude the only evidence by which such an agreement can be established.....

P. 480. But, be that as it may, it is obvious that in cases where formal authentication by notarial act is dispensed with, it would be dangerous for the courts to support gifts except upon plain and conclusive evidence of the agreement.

¹ Admiralty, 1866 July 21, IV Moore N. S. 41.

² Victoria, 1882 March 11, L. R. VII Appeal Cases 307.

³ Quebec, 1874 May 2, L. R. V.P. C. 461.

PAROL EVIDENCE TO PROVE WILLS.ALLEN V. MADDOCK ¹

50. Where there is a reference in a duly executed testamentary instrument, to another testamentary instrument, imperfectly executed, but by such terms as to make it capable of identification, it is necessarily a subject for the admission of parol evidence, and such parol evidence is not excluded by the 1st Vict. ch. 26, and when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified. *See WILLS: form of wills, same cause.*

THE RIGHT HON. T. PEMBERTON LEIGH, p. 440: — It is necessary also to remember the distinction between the admissibility of evidence to prove a testamentary paper, and of evidence to explain its meaning, that direct evidence of intention, declarations of the testator by word, or in writing, and other testimony of a similar character, are admissible, when the will is disputed, but that no such evidence can be received in order to explain the expressions which he has used. Still, in construing his will, the court is entitled, and is bound, to place itself in the situation of the testator with respect to his property, the objects of his bounty, and every other circumstance material to the construction of the will, and for the purpose to receive, if occasion require it, parol evidence of those circumstances, and to expound his meaning with reference to them.

P. 454: — A reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities seem clearly to establish that where there is a reference to any written document, described as then existing, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question then is, whether the evidence is sufficient for the purpose.

MIGNEAULT V. MALO ²

51. The law which introduced into Canada the English law as to wills must be considered as having introduced it with all its incidents, and, therefore, with the admissibility of oral evidence.

PAROL EVIDENCE TO EXPLAIN DEEDS.THE BACON LIFE AND FIRE ASSURANCE CO. V. GIBB ³

52. In order to construe a term in a written instrument, when it is used in a peculiar sense, differing from its

¹ Canterbury, 1858 Feb. 19, XI Moore 427.

² Quebec, 1872 Feb. 3, VIII Moore N. S. 347.

³ Lower Canada, 1862 Dec. 3, I Moore N. S. 73.

PAROL EVIDENCE TO EXPLAIN DEEDS.

ordinary meaning, evidence is admissible to prove the peculiar sense in which the parties understood the term, but evidence is not admissible to contradict or vary what is plain.

PERJURY.CANEPA V. LORIOS ¹

58. The appellant had the respondent's clerk indicted and convicted for perjury in his evidence in this case, the appellant himself being one of the witnesses against him in the criminal suit. A transcript of the record of this conviction was sent over to England before the appeal was heard, and was printed by the appellant amongst the other papers laid by him before the Judicial Committee.

The Judicial Committee refused to admit this evidence and remonstrated with the appellant upon such conduct on his part.

LORD WYNFORD, p. 285 : — We highly disapprove of the appellant's indicting one of the witnesses in this case for perjury, supporting the indictment by his own testimony, and attempting to use the conviction to obtain a reversal of the judgment against himself. A criminal prosecution should not be resorted to until civil proceedings are at an end, and the party prosecuting can have no private interest to promote by the prosecution.

The appeal must be dismissed, and the appellant must pay the costs found due on taxation by the proper officer; and we trust that the making persons pay costs who prefer indictments for perjury, and attempt to make use of those indictments on the hearing of appeals, will prevent parties from having recourse to such proceedings in future.

PRESUMPTIONS.BAKER V. BATT ²

54. A will written or procured to be written by a party who is benefitted by it is not void, but this circumstance forms a just ground of suspicion against the instrument, and calls upon the court to be vigilant and jealous; and unless clear and satisfactory proof be given that it contains the real intention of the deceased, it will be pronounced against.

BARRY V. BUTLIN ³

55. The fact of a party preparing a will, with a legacy to himself, is at most only one of suspicion, of more or less weight according to the circumstances, demanding however,

¹ Gibraltar, 1834 Feb. 17, II Knapp. 276.

² Canterbury, 1838 May 16, II Moore 317.

³ Canterbury, 1838 Dec. 8, II Moore 480.

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the vigilant care of the court in investigating the case before granting probate; and though evidence of the instructions given by the deceased, and the reading over of the instrument are the most satisfactory proofs of the testator's knowledge of the contents, they are not the only description of proof by which the cognizance of the contents of the will may be brought home to the deceased, even in a case of doubtful capacity.

BATEMAN V. PENNINGTON ¹

50. Alterations made in pencil in a will are presumed *prima facie* a deliberative act, those in ink, final. But it may be shown to be otherwise.

In re SINISTER'S PATENT ²

57. The fact of an invention when known, not getting into general use, is a presumption against its utility.

COOPER V. BARRETT ³

58. In the absence of all direct written or verbal evidence showing at what time alterations, obliteration, cancelling, superscription or interlineation were made in a will or codicil by a testator, the presumption of the law is that they were made after the execution of the will and probate of the will shall be granted in its original form.

THE GREAT WESTERN RAILWAY COMPANY V. BRAID & FAWCETT ⁴

59. When an injury is alleged to have arisen from the improper construction of a railway, the fact of the bank of the latter having given way will amount to *prima facie* evidence of its insufficiency; and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it.

THE COLONIAL BANK OF AUSTRALASIA V. WILLIAM ⁵

60. When a public company has been incorporated by virtue of a statute which prescribed certain rules for the constitution of such companies, and for regulating their proceedings, it will be presumed in judging of the transactions between the company and other parties, that the requirements of the statute have been complied with.

¹ Canterbury, 1840 July 10, III Moore 227.

² 1842 Dec. 8, IV Moore 164.

³ Canterbury, 1846 Feb. 7, IV Moore 419.

⁴ Upper Canada, 1863 Feb. 7, I Moore N. S. 101.

⁵ Victoria, 1874 March 23, L. R. V P. C. 417.

PRISONER'S DEPOSITION.**THE QUEEN v. COOTE ¹**

61. The fire marshal holding an enquête after the burning of a building examined the proprietor under oath, without preferring any charge against him, and without warning him that his evidence might be used against him. The same person was afterwards indicted for arson, a felony. At the trial his deposition taken as above stated was used. Objection was taken by the prisoner to the fying of such evidence before the jury. After conviction, on a reserved case, the court of Queen's Bench ordered a new trial. On appeal, the Privy Council held that the deposition was properly admitted as evidence against the prisoner at the trial.

62. The depositions on oath of a witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, excepting so much of them as consists of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer.

63. The statute requiring magistrates to caution the accused with respect to statements he may make in answer to the charge, is not applicable to witnesses who are asked questions tending to criminate them.

SIR ROBERT P. COLLIER, p. 472 :—Edward Coote, the respondent, was convicted of arson, subject to a question of law reserved by Badgley, J., (the judge who presided at the trial), for the consideration of the appeal side of the Court of Queen's Bench, in pursuance of ch. 87, sect. 57 of the Consolidated Statutes of Lower Canada. The question reserved was, whether or not the prosecutor was entitled to read as evidence against the prisoner depositions made by him under the following circumstances :—An Act of the Quebec Legislature appointed officers named "Fire Marshals" for Quebec and Montreal respectively, with power to enquire into the cause and origin of fires occurring in those cities, and conferred upon each of them "all the powers of any judge of session, record or coroner, to summon before him and examine upon oath all persons whom he deems capable of giving information or evidence touching or concerning such fire." These officers had also power, if the evidence adduced afforded reasonable ground for believing that the fire was kindled by design, to arrest any suspected person, and to proceed to an examination of the case and committal of the accused for trial in the same manner as a justice of the peace. Upon an enquiry held in pursuance of this statute as to the origin of a fire in a warehouse of which Coote was the occupier, he was examined on oath as a witness. No copy of his depositions accompanies the records, but their Lordships accept the following statement of Badgley, J., as to the circumstances under which they were taken : "Among the several persons examined

¹ Quebec, 1873 March 11, IX Moore N. S. 463.

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respecting that fire was Coote himself, upon two occasions at an interval of three or four days between his two appearances, on each of which he signed his deposition taken in the usual manner of such proceedings, and which was attested by the commissioners. Upon both occasions he acted voluntarily and without constraint; there was no charge or accusation against him or any other person; he was free to answer or not the questions put to him, and frequently exercised his privilege of refusing to answer such questions. Some days after the date of the latter deposition, and after the final close of the inquiry, Coote was arrested upon the charge of arson of his premises and duly committed for trial." At his trial the abovementioned depositions were duly proved, and admitted in evidence after being objected to by the counsel for the prisoner. The objection taken at the trial appears to have been that to constitute such a court as that of the Fire Marshal was beyond the power of the provincial legislature, and that consequently the depositions were illegally taken. Subsequently other objections were taken in arrest of judgment, and the question of the admissibility of the depositions was reserved. It was held by the whole court (in their Lordships' opinion rightly,) that the constitution of the court of the Fire Marshal with the powers given to it, was within the competency of the provincial legislature; but it was further held by a majority of the court that the depositions of the prisoner were not admissible against him, because they were taken upon oath, and because he was not cautioned that whatever he said might be taken in evidence against him, after the manner in which justices of the peace are required to caution accused persons, by an Act of the British Parliament adopted in this respect by the colonial Legislature. The Court held the conviction to be bad, but inasmuch as the objection to it was not founded on the merits of the case, made an order directing a new trial. Their Lordships are unable to concur in what appears to be the view of one of the judges of the Court of Queen's Bench, that the law on the subject of the reception in evidence against a prisoner of statements made by him upon oath is so unsettled that every judge is at liberty in every case to act upon his own individual opinion. It is true that doubts have from time to time arisen on this subject, and that conflicting dicta, and indeed decisions may be found upon it; but, in their Lordships' opinion, all such doubts have been set at rest by a series of recent decisions, not indeed promulgating any new law, but declaring what the law has always been if properly understood. In the case of *Rex v. Haworth*, 4 C. & P. 254, a deposition on oath made by the prisoner as a witness against a person named Sheard, on a charge of forgery, was received in evidence by Park, J., against the prisoner, on an indictment of forgery. In *Reg. v. Goldshade and another*, 1 C. & K. 657, Denman, J., admitted against the defendants, on a charge of conspiracy, answers which they had made on oath in a suit in Chancery. In *Reg. v. Sloggett*, Dears. C. C. 656, the prisoner was examined in the Court of Bankruptcy, under an adjudication against him and answered questions tending to criminate himself without objection. At a certain stage of his examination he was told by the commissioner to consider himself in

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custody. On a case reserved, it was held by the Court of Criminal Appeal that so much of his examination as was taken before his committal to custody was evidence against him. In that case *Jervis, C. J.*, observes: "The test is whether he may object to answer. If he may, and does not do so, he voluntarily submits to the examination to which he is subjected, and such examination is admissible as evidence against him." In *Reg. v. Chidley and Cummins*, 8 Cox C. C. 365, Cockburn, C. J., admitted a deposition made by Cummins, when Chidley alone was accused of the offence for which they were afterwards both tried. The learned editor of the 4th edition of *Russell on Crimes* (vol. 3, p. 418), thus reports a case of *Reg. v. Sarah Chesham*: "Where the prisoner was indicted for administering poison with intent to murder her husband, the coroner stated that he had held an inquest on his body, which was adjourned, and that the prisoner was present as a witness on the second occasion. No charge had at that time been made against her. She made a statement on oath, which the coroner took down in writing. Campbell, C. J., after consulting Parke, B., admitted the statement, and the prisoner was convicted and executed." The case of *Reg. v. Garbett*, Den. C. C. 236, accords with the foregoing. There the prisoner objected to answer certain questions on the ground that his answers might criminate him. His objections, which were based on reasonable grounds, were overruled and he was compelled to answer. It was held by a majority of the judges on a crown case reserved that the particular answers so given were inadmissible against him, but it does not appear to have been suggested that the rest of his deposition was not admissible. The case of *Reg. v. Scott, D. & B. C. C. 47*, seems to go somewhat further. It was there held by the Court of Criminal Appeal (Coleridge, J., dissenting); that although, under the Bankruptcy Act then in force (12 and 13 Vict., c. 106), the bankrupt was bound to answer certain questions, notwithstanding that they might tend to criminate him, nevertheless such answers were admissible against him, the compulsion under which he acted being one of law, and not the improper exercise of judicial authority. From these cases, to which others might be added, it results, in their Lordships' opinion, that the depositions on oath of a witness legally taken are evidence against him should he be subsequently tried on a criminal charge, except so much of them as consists of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle *Nemo tenetur seipsum accusare*, but does not apply to answers given without objection, which are to be deemed voluntary. The Chief Justice indeed suggests that Coote may have been ignorant of the law enabling him to decline to answer criminating questions, and that if he had been acquainted with it he might have withheld some of the answers which he gave. As a matter of fact, it would appear that Coote was acquainted with so much of the law; but be this as it may, it is obvious that to institute an inquiry in each case as to the extent of the prisoner's knowledge of law, and to speculate whether, if he had known more, he would or would not have refused to answer certain questions, would be to involve a plain rule in

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endless confusion. Their Lordships see no reason to introduce, with reference to this subject, an exception to the rule recognised as essential to the administration of the criminal law, *Ignorantia juris non excusat*. With respect to the objection that Coote when a witness should have been cautioned in the manner in which it is directed by statute that persons accused before magistrates are to be cautioned (a question said by Badgley, J., not to have been reserved, but which is treated as reserved by the Court), it is enough to say that the caution is by the terms of the statutes applicable to accused persons only, and has no application whatever to witnesses. If indeed, the Fire Marshal had exercised the power which he possessed of arresting Coote on a criminal charge (but which he did not exercise), then it would have been proper to caution him before any further statement from him had been received. A question has been raised on the part of the Crown whether or not the Court had the power of ordering a new trial, inasmuch as c. 77, s. 63, of the Consolidated Statutes of Canada, giving the Court power to direct a new trial, has been repealed by the subsequent statute 32 and 33 Vict., c. 29, s. 80, which does not itself in terms confer any such power, but in the view which their Lordships take of the case it becomes unnecessary to determine this question. For the reasons above given their Lordships will humbly advise Her Majesty that the order made by the Court of Queen's Bench be reversed, that the conviction be affirmed, and that the said Court of Queen's Bench be directed to cause the proper sentence to be passed thereon.

PROBATE OF WILLS.DOUGLASS V. SMITH & AL. ¹

64. A testator made a will disposing of his real and personal property, subjecting both to the payment of his debts and funeral expenses; the document was signed, sealed and in the handwriting of the testator, but it was not attested, although there was an attestation clause. Probate was refused.

NICOL V. ASKEW ²

65. Probate of a testamentary paper in the nature of a codicil, having been granted by consent in common form, cannot afterwards be revoked, on the allegation that the conditions on which such consent was given have not been complied with, there being no proof of fraud or circumvention practised either upon the court or the parties.

STEWART V. STEWART ³

66. A will having an attestation clause, but no witnesses, was admitted to probate.

¹ St. Vincent, 1833 June 22, II Knapp. 1

² Jamaica, 1837 Dec. 4, II Moore 88.

³ Canterbury, 1838 Feb. 10, II Moore 193.

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MR. JUSTICE BOSANQUET, p. 197 : — It is certainly a rule of the Ecclesiastical courts that a presumption arises against a will if an attestation clause is appended, but no witnesses ; such presumption, it is admitted however, may be rebutted by very slight evidence.

BAKER V. BATT ¹

67. A party who demands the probate of a will is bound to prove the genuineness and authenticity of the will ; and if the judge is not judicially satisfied that the paper in question does contain the last will and testament of the deceased, he is bound to refuse its admission to probate.

BARON PARKE, p. 319 : — For if the party upon whom the burthen of the proof of any fact lies, either upon his own case, where there is no conflicting testimony, or upon the balance of evidence where there is, fails to satisfy the tribunal which is to decide of the truth of the proposition which he has to maintain, he must fail in his suit. And thus in a Court of Probate, where the *onus probandi* most undoubtedly lies upon the party propounding the will, if the conscience of the judge, upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied, that the paper in question does contain the last will and testament of the deceased, it is bound to pronounce its opinion that the instrument is not entitled to probate. And it may frequently happen that this may be the result of an inquiry in cases of doubtful competence in particular, without the imputation of wilful perjury on either side ; or it may be, the judge may not be satisfied on which side the perjury is committed, or whether it certainly exists.

HITCHINGS V. WOOD & AL. ²

68. According to the rule of practice of the Ecclesiastical court, probate will not be granted on the sole evidence of the hand-writing of a testator where the will is disputed. There must be confirmatory proof. In this cause a holograph will sent by post to a legatee, and partially torn across and burnt, was admitted, the handwritting of the testator was admitted, and there was confirmatory evidence as to the genuineness of the instrument.

LORD LYNTHURST, p. 443 : — But according to the rule of practice to which I have before adverted, the Ecclesiastical court will not grant probate on the sole evidence of the hand-writing of a testator where that is disputed. There must be some confirmatory proof ; this confirmatory proof must evidently vary with each particular case, and would require to be more or less stringent according to the weakness or strength of the evidence as to the hand-writing.

¹ Canterbury, 1838 May 16, II Moore 517.

² Canterbury, 1838 June 20, II Moore 355.

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BARRY V. BUTLIN ¹

69. Although the onus of proving a will is on the party propounding it, he is in general discharged by proof of capacity in the testator, and by the fact of the execution of the will, from which the knowledge of and assent to its contents by the testator will be assumed.

This case affirmed in *Browning v. Dudd* by Mr. Baron Parke.

BATEMAN V. PENNINGTON ²

70. Probate granted of a paper written in ink, but dated and signed in pencil, with the addition "in case of accident, I sign this my will," having also an attestation clause unsigned. On reversing the decision of the Prerogative court rejecting an allegation pleading circumstances to entitle a paper to probate, the Judicial Committee retained the cause, and ultimately, after five witnesses had been examined by commission, granted probate of the instrument.

71. The legal presumption against the paper was that *prima facie* any alterations in pencil are deliberative, and those in ink final. ³

DUFAUR V. CROFT ⁴

72. A codicil prepared by a solicitor, not the ordinary solicitor who had made the will of the testator, appointing him a joint executor, with a legacy of £500, which was read over to the testator, who was blind, and, at the time of execution, of fluctuating capacity, in the presence of the attesting witnesses, pronounced against. There was no direct evidence that it was prepared in consequence of instructions from the testator, or satisfactory proof that at the time of the execution he was cognizant of its contents, and in a condition to exercise, and did exercise, thought, judgment and reflection respecting the act he was doing.

HARWOOD V. BAKER ⁵

73. Probate refused of a will executed by a testator on his death-bed in favour of his wife, to the exclusion of the other members of his family; it being proved that the testator was of a weakened and impaired capacity, at the time of the

¹ Canterbury, 1838 Dec. 8, II Moore 480.

² Canterbury, 1840 July 10, III Moore 223.

³ *Hawkes v. Hawkes*, 1 Hagg. Ecc. Rep. 321; *Edwards v. Astley*, 1 Phill. Rep. 35.

⁴ Canterbury, 1840 Feb. 14, III Moore 136.

⁵ Canterbury, 1840 Dec. 17, III Moore 282.

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writing of the will, from disease affecting the brain, which produced torpor, and rendered his mind incapable of exertion unless roused. The disposition in the will was a total departure from, and contrary to the previous expressed intentions of the testator.

MR. JUSTICE ERSKINE, p. 297:—In all cases the party propounding is bound to prove, to the satisfaction of the court, that the paper in question does contain the last will and testament of the deceased, and this obligation is more especially cast upon him when the evidence in the case shows that the mind of the Testator was generally about the time of execution, incompetent to the exertion required for such a purpose.

EDWARDS V. FINGHAM ¹

74. A will executed by a solicitor at the request of a blind testatrix was declared established, although not proved to have been read over to the testatrix. It was sufficient, as proved, that she had a clear knowledge of the contents of the instrument before signing it.

HOTT V. GEUGE ²

75. The mere circumstance of calling in witnesses to sign an holograph will, without giving them any explanation of the instrument they are signing, does not amount to an acknowledgement of the signature by a testator, sufficient to obtain probate.

JONES V. GODRICH ³

76. Remarks of their Lordships on the proof required to obtain probate of a will, on the occasion of a probate demanded by a medical man, the universal legatee of an old man residing with him :

THE RIGHT HON. DR. LUSHINGTON, p. 20 :—The extreme age of the deceased will require stronger proof as to capacity, because at periods so advanced, the mental faculties are often found to decay and fluctuate ; so when a will is made in favour of a medical man in whose house the Testatrix is resident, the court must be upon its guard against undue influence, for practising which there is so much opportunity ; and where a will under such circumstances is made by a solicitor who had no previous knowledge of the deceased, the court must be sure that he distinctly understood her, and acted as her agent, and not as the agent of the legatee, who sent him.

The law of *England* has prescribed no restrictions upon testamentary dispositions, as to who may be the legatees. Where that power is exercised in favour of guardians, trustees, solicitors, medical

¹ Canterbury, 1842 Dec. 9, IV Moore 198.

² Canterbury, 1844 Feb. 21; IV Moore 265.

³ Canterbury, 1844 Dec. 11, V Moore 20.

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attendants, or persons standing in a similar relation to the deceased, the degree of proof required will be greater or less according to circumstances; but if the court be satisfied that there was adequate capacity, testamentary intention, untainted by fraud, and a due execution, the instrument is solid. Fraud cannot be presumed, but the circumstances may render fraud so probable, that the court will require stronger proof, than in cases where all natural presumptions are in favour of the disposition, and the free will of the testator.....

P. 25: — If there is any rule in testamentary law firmly established, it is this, that the witness shall state all the facts from which he draws his conclusion, that a testator was of sound mind at the time of the execution of a testamentary instrument. The court forms its judgment principally from the facts, and not from the opinion of witnesses; and many instances have occurred in which the decision of a court of Probate has been opposed to the conclusion drawn by the witnesses, though the foundation of each opinion was the same facts.....

P. 40. To invalidate a will on the ground of fraud and undue influence, it must be shown that they were practised with respect to the will itself, or so contemporaneously with the will, or connected with it, as by almost necessary presumption to affect it. Other frauds committed against a testator are only evidence to raise strong suspicion against any act done under the superintendence or by the interference of those committing them.

MITCHELL V. THOMAS ¹

77. Proof of the actual reading over of the instrument to the testator, before execution, is not necessary.

WARING V. WARING ²

78. Probate of a will will be refused when the testator, at the time his will was made and published, was labouring under a delusion or was attacked by monomania or partial insanity.

79. If the mind is unsound on one subject, provided that unsoundness is, at all times, existing upon that subject, it is erroneous to suppose such a mind is really sound on other subjects; it is only sound in appearance, for if the subject of the delusion be presented to it, the unsoundness would be manifested by such a person believing it is the suggestion of fancy, as if it were a reality; any act, therefore, done by such a person, however apparently rational that act may appear to be, is void, as it is the act of a morbid or unsound mind.

80. It would be evidence of a lucid interval, if the party freely, voluntarily and without any design, at the time of

¹ Canterbury, 1847 Dec. 10, VI Moore 137.

² Canterbury, 1848 July 4, VI Moore 341.

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alleged sanity and freedom from delusion, should confess his delusion.

81. Where delusions are proved to have existed, both before and after the making of a will, the presumption is, that they existed at the time of the making of the will, and in such case, proof of a lucid interval, at the time of the factum, is thrown upon the party propounding the will. It is immaterial that the delusions do not appear on the face of the will.

LORD BROUGHAM explained as follows the doctrine of *monomania, partial insanity and delusion*, p. 348 :—The question being, whether the will was duly made by a person of sound mind or not, our inquiry, of course, is, whether or not the party possessed his faculties, and possessed them in a healthy state. His mental powers may be still subsisting; no disease may have taken them away; and yet they may have been affected with disease, and thus may not have entitled their possessor to the appellation of a person whose mind was sound.

Again, the disease affecting them may have been more or less general; it may have extended over a greater or a less portion of the understanding; or, rather, we ought to say that it may have affected more, or it may have affected fewer, of the mental faculties. For we must keep always in view that which the inaccuracy of ordinary language inclines us to forget, that the mind is one and indivisible; that when we speak of its different powers, or faculties, as memory, imagination, consciousness, we speak metaphorically, likening the mind to the body, as if it had members or compartments, whereas, in all accuracy of speech, we mean to speak of the mind acting variously, that is remembering, fancying, reflecting, the same mind in all these operations being the agent. We, therefore, cannot, in any correctness of language, speak of general or partial insanity; but we may most accurately speak of the mind exerting itself in consciousness without cloud or imperfections, but being morbid where it fancies; and so its owner may have a diseased imagination or the imagination may not be diseased, and yet the memory may be impaired, and its owner be said to have lost his memory. In these cases, we do not mean that the mind has one faculty, as consciousness, sound; while another, as memory or imagination, is diseased; but that the mind is sound when reflecting on its own operations, and diseased when exercising the combination termed imagining, or casting the retrospect, called recollecting.

This view of the subject, though apparently simple, and almost too unquestionable to require, or even to justify, a formal statement, is of considerable importance, when we come to examine cases of what are called, incorrectly, "partial insanity" which would be better described by the phrase "insanity" or "unsoundness" always existing, though only occasionally manifest.

Nothing is more certain than the existence of mental disease of this description. Nay, by far the greater number of morbid cases belong to this class. They have acquired a name, the disease called

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familiarly, as well as by Physicians, "Monomania," on the supposition of its being confined, which it rarely is, to a single faculty, or exercise of the mind; a person shall be of sound mind, to all appearance, upon all subjects save one or two; and on these he shall be subject to delusion, mistaking for realities, the suggestions of his imagination. The disease here is said to be in the imagination; that is, the patient's mind is morbid, or unsound, when it imagines; healthy and sound when it remembers. Nay, he may be of unsound mind when his imagination is employed on some subjects, in making some combinations; and sound when making others, or making one single kind of combination. Thus, he may not believe all his fancies to be realities, but only some, or one; of such a person we usually predicate that he is of unsound mind only upon certain points. I have qualified the proposition thus on purpose, because, if the being, or essence, which we term the mind, is unsound on one subject, provided that unsoundness is at all times existing upon that subject, it is quite erroneous to suppose such a mind really sound on other subjects. It is only sound in appearance; for if the subject of the delusion be presented to it, the unsoundness which is manifested, by believing in the suggestions of fancy as if they were realities, would break out; consequently, it is as absurd to speak of this as a really sound mind; (a mind sound when the subject of the delusion is not presented;) as it would be to say, that a person had not the gout, because his attention being diverted from the pain, by some more powerful sensation by which the person was affected, he, for the moment, was unconscious of his visitation.

It follows, from hence, that no confidence can be placed in the acts, or in any act, of a diseased mind, however apparently rational that act may appear to be, or may in reality be. The act in question may be exactly such as a person without mental infirmity might well do. But there is this difference between the two cases; the person uniformly and always of sound mind, could not, at the moment of the act done, be the prey of morbid delusion, whatever subject was presented to his mind; whereas; the person called partially insane,—that is to say, sometimes appearing to be of sound, sometimes of unsound mind, would inevitably show his subjection to the disease the instant its topic was suggested. Therefore we can, with perfect confidence, rely on the act done by the former, because we are sure that no lurking insanity, no particular, or partial, or occasional delusion, does mingle itself with the person's act, and materially affect it. But we never can rely on the act, however rational in appearance, done by the latter, because we have no security that the lurking delusion, the real unsoundness, does not mingle itself with, or occasion the act. We are wrong in speaking of partial unsoundness; we are less incorrect in speaking of occasional unsoundness; we should say that the unsoundness always exists, but it requires a reference to the peculiar topic, else it lurks and appears not. But the malady is there, and as the mind is one and the same, it is really diseased, while apparently sound, and really its acts, whatever appearance they may put on, are only the acts of a morbid or unsound mind.

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Unless this reasoning be well founded, we cannot account for the unanimity with which men always agreed in regarding as the acts of an insane mind, those acts to all appearance rational, which a person does who labours under delusions of a plainly extravagant nature, though there is nothing in the act done, and nothing in the conduct of the party while doing it, at all connected with the morbid fancies. If these fancies only affect the party now and then; if for some months he is free from them, labouring under them at other times, then his acts apparently rational would not be regarded as those of a person mentally diseased.

But if we were convinced that at the time of doing the acts the delusion continued, and was only latent by reason of the mind not having been pointed to its subject, and would have instantly shown itself, had that subject been presented, then the act is at once regarded as that of a madman.

Thus, there have been many cases of persons labouring under the delusion that they were other than themselves; some have believed themselves deceased Emperors or Conquerors; others, super-natural beings. Suppose one, who believed himself the Emperor of Germany, and on all other subjects was apparently of sound mind, did any act requiring mind, memory, and understanding. Suppose he made his will, and either did not sign it (before signing was required), or if he did, signed with his own name; but suppose we were quite convinced that had any one spoken of the Germanic Diet, or proceeded to abuse the German Emperor, the testator's delusion would at once break forth, then we must at once pronounce the will void, be it as officious and as rational in every respect, as any disposition of property could be: of course, as no one could propound such a will with any hopes of probate, if it happened, that, while making it, the delusion had broken out, even although the instrument bore no marks of its existence at the time of its concoction it must always be a question of evidence, on the whole facts and circumstances of the case, whether or not the morbid delusion existed at the time of the factum; that is, whether, had the subject of it been presented, the chord been struck, there would have arisen the insane discord, which is absent to all outward appearance, from the chord not having been struck.

GREVILLE V. TYLEE¹

82. Where a will is prepared and written by a medical man in attendance on a testatrix, at that time dangerously ill, and without professional advice, by which he is made the principal object of the testatrix's bounty, to the exclusion of her near relations, a court of justice, regarding the relation of a medical man to his patient will view his conduct with the utmost jealousy.

¹ Canterbury, 1851 Feb. 8, VII Moore 320.

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BROWNING V. BUDD ¹

83. The *onus probandi* is on a party seeking the probate of a will that it is the last and free will of the testator. The change of opinion, after a testamentary act long premeditated and deliberately adopted, is of little weight, because persons, though quite competent, are often governed by caprice in the selection of the objects of their bounty; but when such a change takes place suddenly, and by a wife in favour of her husband, when this latter is carefully excluded from all intercourse with his wife, and that in the last moments, and by the family the head of which is much benefitted by the change, those who are guilty of such an improper act expose themselves to the most serious suspicions of fraud or undue influence in procuring the will, which it has evidently been their object to obtain. However, in this cause, other circumstances justified the probate of the will.

CUTTA V. GILBERT ²

84. Probate of a will made in 1825 was granted by the Judicial Committee. Subsequent to the order in Council, a will dated March 1871 was discovered, and application was made to the Judicial Committee for probate. This application was refused, as the original suit being concluded, the jurisdiction of the Committee was exhausted. But the Committee intimated that if a petition was presented to Her Majesty to refer the matter specially to them, they would entertain the application. Upon such application being presented and referred, the committee revoked the probate of the will of 1825, and granted probate of the will of 1851.

BREMER V. FREEMAN ³

85. A party impeaching a will must prove that it ought not to be admitted to proof; but where the evidence shows that the testatrix had abandoned her English domicile, and took another one in a foreign country and died in the acquired domicile, the *onus probandi* is in such circumstances upon the party propounding the will to prove that the law of the acquired domicile was such as to authorize a will in the form propounded.

SCOULES V. PLOWRIGHT ⁴

86. As a general rule, where there is execution and capacity of execution, the validity of a will is sufficiently

¹ Canterbury, 1848 Dec. 13, VI Moore 431.

² Canterbury, 1854 July 7, IX Moore 131.

³ Canterbury, 1857 March 7, X Moore 306.

⁴ Canterbury, 1856 June 26, X Moore 440.

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established. Where, however, the will is prepared by a party principally benefitted, and the circumstances are suspicious, an exception to this rule prevails, and it is necessary to prove to the satisfaction of the court that the testator had full knowledge of the instrument and its contents, and executed the same freely, without any undue control.

87. In this case the will was written by the party benefitted, to the exclusion of the testator's family, the evidence showed no previous declaration of the testator of an intention to make such a will, and no subsequent recognition by him of its contents; but, on the contrary, the evidence established, from the whole conduct of the testator, that he executed the will in ignorance of its contents, while acting under the control of the party principally benefitted. The will was declared null and probate was refused.

PRINSEP AND THE EAST INDIA COMPANY V. DYCE SOMBRE & AL.¹

88. The presumption of law is, that the verdict of a jury, under a commission of lunacy, that the party, the subject of the commission, is of unsound mind, is well founded; and, if the commission remained unsuperseded, that the party continued a lunatic at his death. Such presumption, however, may be rebutted and displaced by positive proof of entire recovery, or possession of a lucid interval, when the testamentary instrument was executed.

89. The *onus probandi* lies upon a party setting up a will, made during a subsistence of a commission of lunacy, to establish the affirmation of complete or partial recovery of the lunatic at the time of giving instructions for and executing the will.

THE RIGHT HON. DR. LUSHINGTON, p. 239:—We apprehend that, though the opinions of the physicians who so carefully examined the deceased, and testified to his soundness of mind, are entitled to weight and consideration, yet that the commission not having been superseded, the legal presumption is against the solidity of any testamentary instrument; and consequently the *onus* of proving the soundness of mind of the testator is imposed upon the party setting up the instrument. We will observe that, though the cases are rare, yet there have been some instances where the validity of a will has been pronounced for, notwithstanding that the testator was, at the period of making it, under the protection of a commission, as in the case of *Cartwright v. Cartwright*.²

Under such circumstances, it is competent to the party setting up a testamentary instrument to maintain: *First*, either that the de-

¹ Canterbury, 1856 April 16, X Moore 232.

² Phill. Ecc. Rep 90.

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ceased was always of sound mind; *secondly*, that though he may have been formerly of unsound mind, he had entirely and completely recovered; or, *thirdly*, that the will was made during a lucid interval.

LLOYD V. ROBERTS ¹

90. If a will appears upon the face of it to have been properly executed according to the requirements of the Wills Act. 1 Vict., ch. 26, the presumption of law is, that the testator duly acknowledged it.

91. The will in this case was entirely in the handwriting of the testator with an attestation clause in its proper place, and attested by two witnesses, The wife and daughter of the testator opposed the probate of the will on the ground that it was written after the witnesses attested the will. One of the attesting witnesses was dead. The other deposed that when he signed the will, with the exception of the testator's signature, and the signature of the other attesting witness, the paper was blank.

The Committee held that from the appearance of the will, as well as the circumstance that the testator was a professional man well acquainted with the necessity of a proper execution, and the presumption of law, that the will was written when attested, and had been duly acknowledged in the witnesses' presence notwithstanding the testimony of the surviving attesting witness, who, in the opinion of the Judicial Committee, must have been mistaken, or his memory failed him.

MIGNEAULT V. MALO ²

92. According to the uninterrupted practice and usage of the courts in Lower Canada, the grant of probate is not of that binding and conclusive character which attaches to it in England, and does not prevent the heirs from impugning the validity of a will in their defence to an action brought by a legatee under the will.

SIR ROBERT PHILLIMORE, p. 364:—There is no doubt that a probate in England granted in solemn form after due citation of parties would have this effect. And it is certainly much to be lamented if a rule of law and practice so obviously conducive to the interests of justice and the quieting of litigation does not prevail in Canada. Their Lordships, therefore, desired this part of the case to be argued separately. The result is as follows:

Previously to the year 1774, and the passing of the Imperial

¹ Canterbury, 1858 Feb. 16, XII Moore 158.

² Lower Canada, 1872 Jan. 15, VIII Moore N. S. 347.

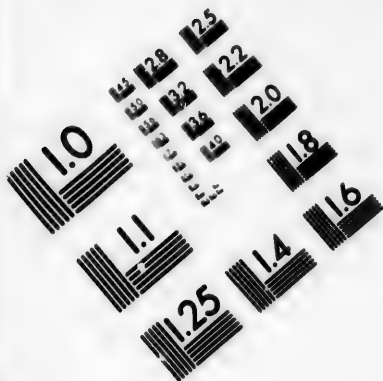
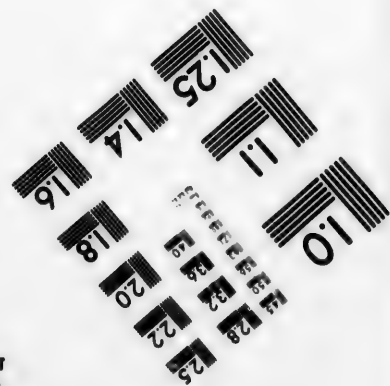
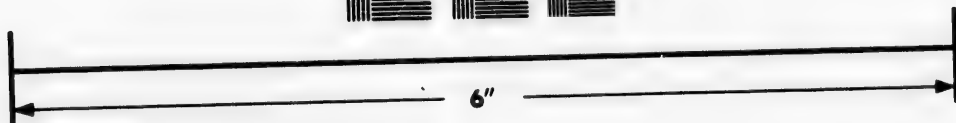
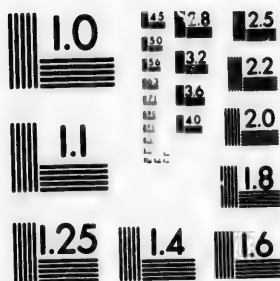


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Statute, 14 Geo. III., cap. 83, wills, according to the Common Law of Canada, may be made only in one of three ways :

1. Before two notaries.
2. Before a notary and two witnesses.
3. By a holograph writing which did not require witnesses.

The Statute (or Quebec Act, as it is usually called) 14 Geo. III., cap. 83, however, introduced another form of will, enacting (section 10), "That it shall and may be lawful to and for every person that is owner of any lands, goods, or credits, in the said province, and that has a right to alienate the said lands, goods, or credits, in his or her life time, by deed of sale, gift, or otherwise, to devise or bequeath the same at his or her death by his or her last will and testament, any law, usage, or custom, heretofore or now prevailing in the Province, to the contrary hereof in anywise notwithstanding, such will being executed, either according to the laws of Canada, or according to the forms prescribed by the laws of England."

There appears never to have been, and not to exist at present, any Court which exercises a special jurisdiction with respect to wills.

A practice dictated by obvious convenience or necessity seems to have grown up in Canada, after the conquest of that country by England, of registering, or as it was somewhat loosely termed, proving, wills made according to English law before a Judge of the Civil Court. This practice, the legal effect of which was very doubtful, continued till 1801, when a Provincial Statute (41 Geo. III., c. 4, s. 2, incorporated in the Consolidated Statutes, c. 34, s. 3), provided as follows:—"Whereas doubts have arisen touching the method now followed of proving last wills and testaments made and executed according to the forms prescribed by the laws of England, before one or more of the Judges of the Courts of Civil Jurisdiction in the province; be it therefore enacted that such proof shall have the same force and effect as if made and taken before a Court of Probate."

At first sight it certainly appeared to their Lordships that this language availed to introduce the law of England with respect to the conclusiveness of a probate duly granted, into the law of Canada; and that where, as in the present case, a suit as to the validity of a will had been contested in open Court, both parties appearing, pleading, and one examining, the other cross-examining, witnesses, and probate had then been granted, the same question could not be raised again, at all events between the same parties, before another tribunal; but that the production of the probate would operate as an estoppel to any such action. This, moreover, appears to their Lordships to be the true construction of the words, "such proof shall have the same force and effect as if made and taken before a Court of Probate."

Their Lordships, however, think that they cannot consider this matter now as *res integra*. They cannot disregard the practice of the Canadian Courts with respect to it for the last seventy years, and they have therefore made as careful an investigation into this practice as the circumstances permit.

It appears, in the first place, that no appeal has ever been instituted from a Decree or Grant of Probate made by the Court—that

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it is very doubtful whether any allegation or plea as to the merits, for instance, a plea or allegation setting up insanity or undue influence, could be propounded, or would be admitted on an application for probate.

It is enacted by the 23rd section of the 78th chapter of the Consolidated Statutes of Lower Canada, in the year 1860, that "any Judge of the Superior Court, at any place where the said Court or the Circuit Court is appointed to be held, shall, in any Court or out of Court, in term or out of term, or in vacation, and any prothonotary of the Superior Court at the place where his office is therein held, shall, out of Court, but in term or out of term, have, and may exercise within and for the district in which such place as aforesaid lies, the same power and authority as is then vested in the Superior Court and the Judges thereof, in what respects the probate of wills, the election and appointment of tutors and curators, as well under the general law as under the provisions of chapter 87 of these Consolidated Statutes relating to Insolvent Debtors, or any other Act, the taking of the counsel and opinion of relations and friends in cases where the same are by law required to be taken, the closing of inventories, attestation of accounts, *insinuations*, affixing and taking off seals of safe custody, the emancipation of minors, the homologation or refusal to homologate proceedings had at any *avis de parents* called or held by or before any notary, and other acts of the same nature requiring despatch; and the proceedings in all such cases shall form part of the records of the Superior Court at the place where they are had, or of the Circuit Court at such place, if the Superior Court be not held there."

(2.) "But the appointments and orders made by any prothonotary under this section, or made under the same by any Judge out of Court, shall be liable to be set aside by any Judge of the said Court, sitting in the same district in Court and term, in like manner and under the provisions of law in and under which appointments and orders made by one or more Judges out of Court, in matters requiring despatch may be set aside by the Superior Court" (12 Vict., c. 38; 20 Vict., c. 44, s. 91.)

In the Civil Code of Lower Canada, which became law in 1866, therefore, before the making of the will in question, it is enacted (section 3, § 856.) "The originals and legally certified copies of wills made in authentic form, make proof in the same manner as other authentic writings."

(§ 857) "Holograph wills and those made in the form derived from the laws of England, must be presented for probate to the Court exercising superior original jurisdiction in the district in which the deceased had his domicile or if he had none, in the district in which he died, or to one of the Judges of such Court, or to the prothonotary of the district. The Court, or Judge, or the prothonotary, receives the depositions in writing, and under oath of witnesses competent to give evidence, and these depositions remain affixed to the original will, together with the judgment, if it have been rendered out of Court, or a certified copy of it, if it have been rendered in Court; parties interested may then obtain certified

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copies of the will, the proof, and the judgment, which copies are authentic, and give effect to the will until it is set aside upon contestation.

"If the original of the will be deposited with a notary, the Court or Judge, or the prothonotary, causes such original to be delivered up."

(† 858.) "The heir of the deceased need not be summoned to the probate thus made of the will, except it is so ordered in particular cases.

"The functionary who takes the probate takes cognizance of all that relates to the will.

"The probate of wills does not prevent their contestation by persons interested."

In the Fourth Report of the Commissioners which preceded the enactment of the Civil Code, it is said (p. 179):

"The third section treats of the proof of wills and also of the preliminary probate, before a Judge, of such as have not been made in authentic form. A will frequently concerns several parties, by all of whom it would be difficult to have it acknowledged, though these persons and even third parties be interested in submitting its validity without delay to a preliminary test. The proceeding adopted for this purpose is well known in England and in this country under the name of probate; it is now particularly in use in England where wills have no form corresponding with our authentic form. In the old French law, as well as in the ancient practice in this country, traces are still found of a similar probate as regards holograph wills. It is not, however, necessary to extend the researches upon this point, the probate of holograph wills and of wills made in the English form having uniformly been effected in the same manner, which is that of the common form of probate adopted in England, where a more solemn form of probate is also practiced, to which the parties interested are summoned, and by which they are bound. This latter form of probate is not in use in this country, unless it be compared to a contested action before the Courts. The probate here takes place before a Judge and out of Court. Our Provincial Statute of 1801 merely says that the form of probate then in use shall continue to be practised." * * *

The "contestations" spoken of in the Report and the Code, does not appear to mean, as it would in England, a suit in the Court of Probate, before probate is granted or enforced, but in some other suit, a suit before a Civil Court, in which the validity of the will is impugned.

Upon the whole, it appears to their Lordships that, by the uninterrupted practice and usage of the Canadian Courts of Justice, since 1801, the law has received an interpretation which does not affix to the grant of probate, even in the circumstances of this case, that binding and conclusive character which it has in England, and that, according to that interpretation, it was competent to the respondent to impugn the validity of this will by way of defence to the action brought by the appellant for the payment of the annuity.

Their Lordships think that they ought not to advise Her Majesty that a different construction ought now to be put upon the law.

PROOF OF SIGNATURE BY COMPARED HANDWRITINGDOE DEN DEVINE v. WILSON & AL.¹

93. It is for the plaintiff to prove the genuineness of the signature of a witness to a deed in a civil suit, not for the party impeaching it, as in a criminal proceeding; and it is a misdirection on the part of a judge to tell a jury in a civil suit, that under such circumstances, they must try the question as to whether the deed was forged or not, in the same manner as if the defendant were on his trial for forgery. Such misdirection will entitle the plaintiff to a new trial.

94. The handwriting of a deceased witness, made at the time of his examination by commissioners, but not returned with the depositions, is sufficiently in evidence to admit of being produced in court for the purpose of comparison with his signature to a deed the genuineness of which is impeached.

95. But a private letter written by the deceased witness, and which his daughter brought in court, is not in any way evidence in the cause and cannot be handed to the jury.

PROOF OF INSOLVENCY.JONES v. MCKENZIE²

96. To annul an equitable mortgage under the Insolvency law of New South Wales, on the ground of insolvency of the mortgagor, absolute proof of this latter's insolvency at the time of the execution of the deed is required. The affidavit of the official assignee to that effect is not sufficient. The case, was remitted to the court below for further evidence. See remarks of Lord Romilly *re Barron v. Stuart*. The "*Panama*"; *BOTTOMRY AND RESPONDENTIA: right of master to effect loan on.*

SERVITUDE.FRÉCHETTE v. LA COMPAGNIE MANUFACTURIÈRE DE ST. HYACINTHE³

97. Where a person complains that the flow of water in a stream passing through his land has been obstructed by the act of the owner of the lower land, and the defendant sets forth in his plea that the plaintiff by his own works has altered the natural course of the stream, it is for the plaintiff to prove, in order to make out a case entitling him to relief, that the servitude, as it existed previous to the changes made by himself has been interfered with by the lower proprietor. For their Lordships' remarks: *See SERVITUDE: water course, same cause.*

¹ New South Wales, 1855 July 25, X Moore 502.

² New South Wales, 1859 July 19. XIII Moore 1.

³ Quebec, 1883 Nov. 24, L. R. 1X Appeal Cases 170.

SHORTHAND.**RIEL V. THE QUEEN**¹

98. A statute which prescribes that full notes of the evidence be taken is literally complied with when these notes are taken in shorthand.

LORD HALSBURY, p. 30: — The second point suggested assumes the validity of the act, but is founded on the assumption that the act itself had not been complied with. By the 7th sub-section of the 76th section it is provided that "the magistrate shall take, or cause to be taken, in writing notes of the evidence and other proceedings thereat;" and it is suggested that this provision has not been complied with, because, though no complaint is made of inaccuracy or mistake, it is stated that the notes were taken by a shorthand writer under the authority of the magistrate and by a subsequent process extended into ordinary writing intelligible to all. Their Lordships desire to express no opinion as to what would have been the effect if the provision of the statute had not been complied with, because it is unnecessary to consider whether the provision is directory only, or whether the failure to comply with it would be ground for error, inasmuch as they are of opinion that the taking full notes of the evidence in shorthand was a causing to be taken in writing full notes of the evidence, and, therefore, a literal compliance with the statute. Their Lordships will, therefore, humbly advise Her Majesty that leave should not be granted to prosecute this appeal, and that this petition should be dismissed.

SLAVE TRADE ACT.**HARRISON V. THE QUEEN**²

99. According to the rules of the Admiralty court, in cases of seizure for infraction of the Slave Trade Act, two persons at least of the crew must be sent with the vessel to be produced before the court, as necessary witnesses, and one of those persons should be the chief mate, supercargo, or boatswain, and the court cannot condemn a ship without their evidence.

HOCQUARD & AL. V. THE QUEEN, THE "NEWPORT"³

100. In order to subject a ship to forfeiture under the Slave Trade Act, it is necessary to prove that she was employed in contravention of the object of the Act, and that she was so employed with the knowledge of the owner; and as to the shippers, that the goods had been shipped by them wilfully and knowingly, for the purpose of being so employed.

¹ Manitoba, 1885 Oct. 22, 55 L. J. P. C. 28.

² V. A. St. Helena, 1856 Feb. 8, X Moore 201.

³ V. A. St. Helena, 1857 Dec. 8, XI Moore 155.

SUSPICIONS IN CRIMINAL SUITS.SHERWILL V. THE KING ¹

101. Judges must be very cautious not to condemn on mere suspicions in criminal cases.

LORD WYNFORD, p. 12:—There cannot be a doubt, I think, that there is a great deal of suspicion about this case. But I entirely agree with the appellant's counsel that we are not in this case or any other criminal case to decide on suspicion, and that the more serious the offence is, the greater should be the caution of the judges before they condemn.

USAGE AS LAW.REGINA V. BERTRAND ²

102. Long usage becomes law, and the judges must apply it as law, but the courts cannot make that to be law which neither usage nor the legislature has made to be so, however just, reasonable or expedient it may appear.

SIR JOHN T. COLERIDGE, p. 479:—..... what long usage has gradually established, however first introduced, becomes law; and no court, nor any more this Committee, has jurisdiction to alter it; but, on the same principle, neither the one nor the other can, in the first instance, make that to be law which neither the Legislature nor usage has made to be so, however reasonable or expedient, or just, or in analogy with the existing law it may seem to be.

EXCHANGE**WHEN THE CONTRACT IS PERFECT.**PORT CANNING LAND COMPANY V. SMITH ³

103. In an exchange, the contract is perfect when it is agreed upon and the thing exchanged is determined on one side, although it is not defined and specified on the other side, as where a further act is required to ascertain it.

SIR MONTAGUE E. SMITH, p. 132:—The case is in this view extremely simple. It is an agreement to exchange, where on the one side the thing to be exchanged is already defined and specified, and where that which is to be taken in exchange is to some extent indefinite and requires a further act to ascertain it. Suppose A. and B. had agreed to make an exchange of this sort; A. agrees to give B. six cows, specific cows, in exchange for six horses, which he is at liberty to select out of the stock then upon B's farm, the selection to be made at a future time; this is a perfect agreement for the exchange, and all that remains is that A. should select the horses on B's farm. There might be a dispute whether the horses that were upon the farm at the time of the agreement had not been removed, and others substituted; they might differ as to the horses which

¹ Gibraltar, 1836 July 11, 11 Moore 12.

² New South Wales, 1867 June 23, 14 Moore N. S. 479.

³ Port Williams, 1874 Feb. 5, L. R. V P. C. 114.

WHEN THE CONTRACT IS PERFECT.

were intended to be taken in exchange; but that would not affect the agreement, but would be a question of the mode of performance of it.

EXECUTION**LAWS APPLICABLE TO**LINDSAY V. DUFF ¹

104. Where an action has been decided by the Judicial Committee under the English laws and rules of procedure, the court below is wrong in applying the colonial Roman Dutch law to the proceedings in execution of the judgment.

OF JUDGMENT PENDING APPEAL.GORE & AL. V. BETHEL & al., THE "QUEEN" ²

105. The judgment of the court below was allowed, pending the appeal, to be carried into effect upon the respondents giving sufficient security to abide the event of the appeal.

ON RAILWAY.

106. A railway may be seized for the debt of the company like any other immoveable. See *Redfield v. Corporation of Wickham*, *VO RAILWAY: liability to seizure*.

SALE OF SHIPS UNDERTHE "FRANCISKA" AND THE "UNION" ³

107. A ship and cargo taken as prize having been condemned by the Admiralty court, were sold under a judgment of that court, pursuant to the Prize Act, 17th and 18th Vict., ch. 18, s. 26. The decree was reversed by the appellate court, and simple restitution decreed.

Their Lordships held that as the captors were *boni fide* in possession during the litigation, they were entitled to the rights, allowances, and incidents attaching to such possession, and that the claimants were only, upon simple restitution, entitled to the net proceeds of the sale after deducting from the gross proceeds the Marshal's charges, consisting of expenses of sale, reasonable expenses for the care and custody of the property pending adjudication, and for pilotage, lights, and other dues, incurred in bringing the ship to England.

EXPERTS**CONSTRUCTION OF REPORT.**SWIFT V. KELLY ⁴

108. Weight to be given to the evidence of persons interrogated as experts with regard the law or principles of their own art exposed as follows:

¹ Ceylon, 1862 June 20, XV Moore 452.

² V. A. Bahamas, 1858 June 24, XII Moore 189.

³ Admiralty, 1856 July 1, X Moore 1856.

⁴ Canterbury, 1835 July 1, III Knapp 289.

CONSTRUCTION OF REPORT.

LORD BROUGHAM, p. 289:—When lawyers are called as witnesses to state the law, or when the evidence of any other skilful persons is adduced for the purpose of explaining the principles of their own art, in which we are bound to give them credit, they may answer the questions put in two ways; they may either give a mere opinion or dictum, on the statement of what the doctrine is, without entering into any reasons; in which case we are bound by what they deliver, if they be unanimous; and if they differ, we are left to weigh the testimony of one against another as best we can; or they may assign the reasons on which their statement is grounded, and then we are not bound by the opinion they give, but may examine the reasons; and being, as it were, admitted to see the particulars of the calculation, and not merely the result, we may form an opinion for ourselves; at all events, we may reject the one they give, on finding it is not come at by the reasoning. It will thus happen, that when divers witnesses have been examined to the same point, and give different statements or opinions with their reasons, we may be enabled to arrive at the truth, notwithstanding this discrepancy, by attending to the reasons adduced by each.

REFERENCE TOHUTCHINSON V. GILLEPSIE ¹

109. Order of reference to take accounts made pursuant to the powers contained in 3rd and 4th Wm. IV, ch. 41, s. 17, notwithstanding the dissent of the respondent's counsel, to the court referring the same, with order to report to the committee finally, or from time to time at the request of the parties. The object of the reference was to ascertain the amount due to the estate of Wm. Hutchinson.

The appeal was allowed to stand over until after the report of the referee.

THOMPSON V. CARTWRIGHT ²

110. An order referring to an expert the question whether a sum is due or not due is irregular and ought to be reversed with costs; but costs were refused as the same relief might have been obtained in this cause by a rehearing in the court below. *See PRACTICE.*

EXPROPRIATION**EVIDENCE IN**BEAUDRY V. THE MAYOR & AL. OF MONTREAL ³

111. The corporation of the city of Montreal are authorized by 14 & 15 Vict. ch. 128 to purchase and acquire, or to take lands for the purpose of public improvements in that city,

¹ Lower Canada, 1838 Feb. 16, II Moore 243.

² Jamaica, 1841 June 22, III Moore 421.

³ Lower Canada, 1858 Feb. 5, XI Moore 1858.

EVIDENCE IN

the value whereof, if disputed, is by section 68, to be ascertained at a session held by the justices of the Peace and determined by a jury specially summoned for that purpose.

112. The Judicial Committee held that the jury were not of themselves qualified to assess the value, without the evidence of experts, and that a party claiming compensation for land taken by the corporation was entitled to produce witnesses as to the value; there being no express words in the Act, or necessary implication, to take away the right to have witnesses sworn and examined, and that the Justices of the Peace were wrong in refusing to take such evidence, and the justices being under the Act competent to swear a jury were competent to swear witnesses on behalf of claimant.

Held also that the appearance of the plaintiff at the proceedings, could not be taken as a waiver of his right to complain of the illegality of the decision.

LORD CHIEF BARON POLLOCK, p. 425: — and, indeed, in any case, where a jury is summoned and sworn to determine and award the amount of compensation, it would, in our judgment, require express words, or an implication of absolute necessity, to take away the claimant's right to have his witnesses sworn and examined. We think the act did not take this right away. If the Justices were competent to swear the jury, so were they to swear the witnesses; and, in our judgment, the witnesses might have been, and ought to have been, sworn and examined.....

P. 426: — And as the act does not direct any judgment to be given, or make the proceedings conclusive and final, we think any manifest failure of observing the fundamental forms and principles of the administration of justice would vitiate the proceeding before the Justices, and render it null and void.

POWERS OF COMMISSIONERS.**THE MAYOR ET AL., OF MONTREAL V. STEPHENS ¹**

113. Under the Provincial Statute, 27 and 28 Vict., ch. 60, and 29 & 30 Vict., ch. 56, s. 12, the Commissioners appointed to value the land required for a municipal expropriation must, at the same time that they determine the amount of indemnity granted to a proprietor for his expropriated land, assess and apportion that indemnity upon the different persons benefited by the improvements. Such assessment and apportionment cannot be made after the report of the Commissioners has been homologated, as they have become *functi officio*. The duties of these Commissioners are those of experts.

¹ Quebec, 1878 Feb. 1, L. R. III Appeal Cases 605.

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THE MAYOR & AL. OF MONTREAL V. BROWN ¹

114. The respondent was a Commissioner appointed under the Canadian statute for expropriation, to value the lands required for public improvements. In determining the value of a property situated in one of the commercial streets of the city of Montreal, the respondent with the other Commissioners took into consideration the prospective increase in value of the property. The city of Montreal claiming that to be an erroneous principle amounting to a want of diligence and gross negligence, and for other reasons such as fraud and venality, petitioned the court for the dismissal of respondent. The Judicial Committee held that none of the appellant's allegations were proved, and that the above principle of valuation was right.

SIR HENRY KEATING, p. 184: — But it is unnecessary here to enter upon the discussion which seems to have taken place in the Court below as to the exact meaning of those words, because their Lordships are unable to concur in the view taken by the Superior Court as to the principle to be adopted in the valuation of land to be expropriated under this statute. The Superior Court were of opinion that in valuing such land the prospective capabilities of it are not to be taken in consideration; that this is not a legal element in the calculation; that you are to look at the land and what is upon it at the time that the valuation takes place; and that you are not to go into what they are pleased to term hypothetical or speculative inquiries as to what purposes the land might advantageously be applied to. Their Lordships are of opinion that the prospective capabilities of land may form and very often are a very important element in the calculation of its value, and therefore they cannot in the view of the Superior Court, which seems to have supposed that consideration was to be absolutely excluded in the valuation under the Act of Parliament.

MORRISON V. MAYOR & AL. OF MONTREAL ²

115. The report of Commissioners in expropriation, although not final, must be considered correct until it is proved to be erroneous. The *onus* of proving error on the part of the Commissioners lay upon the plaintiffs. The action to be taken by the expropriated party is not merely an appeal from the report of the Commissioners, but a claim for an augmentation which admits new evidence.

The same doctrine as to the prospective value of land, in determining its value, established in the above cause of *The Mayor & al. of Montreal v. Brown* was maintained.

¹ Quebec, 1876 Nov. 11, II L. R. Appeal Cases 1.

² Quebec, 1877 Dec. 10, L. R. III Appeal Cases 148.

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SIR BARNES PEACOCK, p. 155:—It was contended on behalf of the Respondents that, in order to maintain an action upon the ground of error on the part of the Commissioners in respect of the amount of the indemnity, it must be shewn that the award of the Commissioners was erroneous with reference to the evidence which was adduced before them. It has, however, been held in the Court of Appeal in Canada, in the case of *Bagg v. Mayor of Montreal*,¹ and also in the present case, one learned Judge only dissenting, that whenever it can be shewn that the Commissioners have arrived at a wrong conclusion with respect to the value of the property or the amount of compensation, the party expropriated is entitled to maintain an action to obtain an augmentation of the indemnity. Their Lordships are clearly of opinion that that is the proper construction of the Statute. The construction contended for is wholly inconsistent with the 27 and 28 Vict., cap. 60, sec. 13, ch. 7, by which it was enacted that the examination of the witnesses should not form part of the report of the Commissioners, and also with the 7th section of the 35 Vict., cap. 32, by which the party expropriated is authorized, in the case of error on the part of the Commissioners, to proceed "by direct action in the ordinary manner" to obtain an augmentation of the indemnity, which necessarily includes the right to adduce evidence in support of the action.

The substantial question to be determined in this appeal, therefore, is whether the evidence adduced in the action was sufficient to prove that there was error on the part of the Commissioners as regards the amount of the indemnity awarded by them. In determining that question, their Lordships are of opinion that the prospective capabilities of the land ought to be taken into account, and that for the purpose of this appeal, it may be assumed that some enhancement of price ought to be made upon the ground of the proprietors being obliged to part with their land compulsorily.

It was urged that at the time when the Commissioners made their award it had been determined by the Superior Court that, in valuing land for the purpose of expropriation, the prospective capabilities were not to be taken into consideration; and that, although that decision was reversed on appeal to Her Majesty in Council, the appeal had not been decided at the time when the Commissioners made their reports, and that it must be assumed that the Commissioners did not take into consideration the prospective capabilities.

The Commissioners in their report are silent as to their reasons; but their Lordships having regard to the evidence adduced before the Commissioners and to the amount awarded by them, viz., \$210,000, cannot suppose that the Commissioners excluded from their consideration the prospective capabilities, or the fact that the expropriation was compulsory. Calculating the dollar at 4s, the sum awarded was equal to £42,000, which for 82 acres was at the rate of nearly £520 an acre for the land, which at the time of the expropriation was producing but little, if any, profit.

The \$245,000 awarded by the learned Judge in addition to the

¹ 19 L. C. J. 136.

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\$210,000 awarded by the Commissioners make a total of \$455,005, which at 4s. a dollar is equal to £91,000, or upwards of £1,120 an acre for each of the 81 acres, of which some of the witnesses stated that not more than one-half was fit for building purposes.

The learned Judge held very properly that the only question before him was one of fact, which must be determined by the evidence given in his presence.

The real issue, as it appears to their Lordships, is was there error on the part of the Commissioners in awarding only the sum of \$210,000, and, if so, to what extent were the plaintiffs entitled to an augmentation of it?

The report of the Commissioners, which under the former law would have been final, must, notwithstanding the alteration of the law, be considered correct until it is proved to be erroneous. The onus of proving error on the part of the Commissioners lay upon the plaintiffs. The judgment of the Commissioners, as expressed in their report, was entitled to great weight. It is not in this case merely the judgment of a majority. The report was unanimous, and was one in which the Commissioner appointed by the appellants themselves concurred. Their Lordships are of opinion that it should not be lightly overturned, and that the learned Judge did not give sufficient weight to it. He treated the question before him as he would have done if he had had to assess the amount of compensation in the first instance. He said he must determine it according to the evidence which he had heard, and by which he considered himself to be bound as absolutely as he would be by evidence proving the items of a tradesman's bill.

Treating the subject in that manner, the opinion of the Commissioners had no more weight attached to it than if they had made no report at all. In another part of his judgment the learned Judge remarked:—"I have to judge according to the evidence. As I view the case, the law no more makes me judge of the value of real estate, apart from the sworn evidence before me, than it makes me judge of the value of pork, or flour, or any other thing of which the value is in question before me. In the one case, as in the other, I can only know what is proved. If this evidence is untrue, it was the business of the defendants to contradict it, which they have not done. If it is true, I have done no injustice in acting upon it."

The learned Judge seems to have taken too narrow a view of his functions. It was his duty to make use of his own judgment and experience in deciding whether the opinions of the witnesses were sufficient to outweigh the judgment of the Commissioners. In their Lordships' opinion the learned Judge attached too much importance to the opinions of witnesses, which were chiefly of a speculative character; and they have to observe that the amount awarded by him exceeded the valuation of some of the claimant's own witnesses.

Their Lordships, therefore, concur with the majority of the judges of the Court of Queen's Bench in the opinion that the judgment of the learned Judge of the Superior Court cannot be sustained. This being so, they are driven to the alternative of either affirming the judgments of the Court of Queen's Bench or of themselves fixing the

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amount of indemnity which ought to be paid. Notwithstanding the obvious inconvenience of the latter course, they would consider it their duty to adopt it if they saw clear proof that there had been a miscarriage of justice. But having listened with great attention to the arguments of the learned counsel for both parties, and having weighed with great care all the evidence in the cause, they have come to the conclusion that they would not be justified in declaring against the opinion of the majority of the judges of the Court of Queen's Bench that there was error on the part of the Commissioners with regard to the amount of indemnity determined by them.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment of the Court of Queen's Bench and to dismiss this appeal. The appellants must pay the costs of the appeal.

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FABRIQUE

POWERS OF THE CURÉ AND MARGUILLIER EN CHARGE.

THE QUEBEC FIRE ASSURANCE COMPANY V. ST. LOUIS & AL. ¹

1. By the old French law, the *curé* and *marguillier en charge*, could not together sell or convey by way of assignment, and without the consent of the *Bureau de l'Euvre de la Fabrique*, any of the rights or property of the *Fabrique*, although they might receive a debt due to it, and, if necessary, subrogate the person who pays to all the rights of the *Fabrique*.

MR. BARON PARKE, p. 318:—The next remaining objection is, that the *curé* and one *marguillier* alone could not make a valid subrogation. That they could not cede or assign by way of sale any of the rights of the church, is beyond dispute. The *curé* and all the *marguilliers* must join, and have the consent of the *Bureau*, to effect a valid transfer of that nature, the principle of the law requiring their sanction for the preservation of the property of the church. But that the *marguillier en charge* may give a legal discharge for a debt due to the *fabrique*, actually paid, may be collected from *Sousse* "On the duties of *Marguilliers*" p. 157; and if the money cannot be received except under the equitable obligation of subrogating the assurees (as we have shown that it cannot) we think it follows, that there must be incidentally a power in one, on the request of the company, to execute the proper instrument of subrogation.

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CURÉ AND MARGUILLIERS OF THE PARISH OF VERCHÈRES

V. THE CORPORATION OF THE PARISH OF VERCHÈRES. ²

2. In all questions of importance affecting the parish, the parish priest, *curé*, and the *marguilliers*, church wardens, must consult, and, before acting, get the authorisation of the parishioners, convened in a public meeting called *assemblée de paroisse*, unless there is a well established custom to the contrary.

3. The *marguilliers* chosen by the parishioners are only invested with a limited power sufficient for the transaction of the ordinary business of the parish, and for the supply of the ordinary necessities of divine worship.

4. This want of authorisation is an absolute nullity, which any interested person may take advantage of.

¹ Lower Canada, 1851 Feb. 6, VII Moore 318.

² Quebec, 1875 March 6, L. R. VI, P. C. 139.

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5, To institute actions or any legal proceedings the *marguilliers* must be authorized by a general meeting of the parishioners, unless there is a well established custom or usage to the contrary.

SIR ROBERT PHILLIMORE, p. 342: — First, was the "authorisation" sufficient or, the position on which the Respondents rely, a nullity?

Secondly, if insufficient and a nullity, was it competent to the Respondents to plead this nullity, or, in the language of the French jurisprudence, "*opposer la fin de non recevoir*" to this action?

No question on the merits of the case has been decided in the Courts below, or is now mooted before their Lordships.

The first question, namely, was the "authorisation" sufficient? is the really important and substantial question in the case.

Their Lordships have carefully examined the various authorities which have been cited to them, as well as others upon which it appeared to them that reliance might be placed.

It seems to their Lordships proper to make at the outset a general observation upon the weight which is due to French jurisprudence and law upon the present question.

It has been urged that the Edit of 1663, which created the "Conseil Supérieur" in Canada, required that all subsequent édits should be registered before they became law in this French Colony, and that, therefore, the authorities derived from French law where this condition was wanting were of little or no weight.

But their Lordships are of opinion that this proposition is too broadly stated:—

It is one thing to say that an Édit required registration before it could become positive law in Canada, and another thing to say that French jurisprudence relating to such Édits can be of no avail in the construction of Canadian law or interpretation of Canadian usage.

It appears to their Lordships that, for these purposes, and so limited, the French jurisprudence has been rightly relied upon by the Courts below, and must be considered by their Lordships.

It is manifest that the early French Colonists must have imported such portions of French law relating to Fabriques as were applicable to their new position. Such portion must have constituted the foundation of the unwritten law of custom which sprung up in Canada before positive law was enacted in these matters for the Colony. Judge Beaudry seems to state the matter in his recent work, "*Code des Curés et Marguilliers et Paroissiens*," p. 2: "*Un grand nombre de ces règles dérivent d'ordonnances rendues depuis 1663, et qui n'ont pas eu force de loi ici, n'ayant pas été enregistrées au Conseil Supérieur de Québec; cependant, ces ordonnances sont souvent invoquées dans nos Tribunaux, du moins comme raison écrite.*" In the absence of any established usage or custom it is right to consult the authorities of great French Jurists like Denisart and Merlin; and sometimes of French édits, which, though directed to a particular Mission, or Paroisse, not unfrequently, as in the case of the "*Arrêt de St. Jean en Grève*," contained—as Durande do

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Maillanne, in his recital of it at length expressly points out—a summary of principles applicable to the general subject.

In the recent case of *Dame Henriette Brown v. Les Curé et Marguilliers de l'Œuvre et Fabrique de Notre Dame de Montréal*, their Lordships had occasion to consider the character and nature of what is called "la fabrique." But it may be as well to cite upon this subject the definite language of Guyot, Rep., tit. "Fabrique," Art. 24:—

"C'est ce qui appartient à une église, tant pour les fonds et les revenus affectés à l'entretien ou à la réparation de l'église que pour les argenteries et les ornements." . . . "désigne aussi par ce terme de fabrique, le corps ou l'assemblée de ceux qui ont l'administration des fonds et revenus dont on vient de parler."

It seems that, except in Quebec, parishes were scarcely established in Canada before the year 1679, and that Verchères was constituted a parish as late as 1722; the first appointment of Marguilliers in that parish appears to have been in the next year; and the extracts from registers of this parish show that the parishioners almost immediately exercised the right of choosing the Marguilliers.

The general question, however, as to the nature of the subjects which could legally be dealt with by the Curé and the Marguillier in charge, or by the Curé and the old and new Marguilliers, without the consent of the general body of parishioners, appears to have not been very strictly inquired into in this parish of Verchères before the year 1830. About that period local circumstances caused the question to be agitated. At first the ecclesiastical authorities appear to have considered that the intervention of the body of the parishioners upon almost any subject relating to the "fabrique" was a gratuitous concession on the part of the Bishop to the parishioners,—a proposition which has indeed, in substance, been maintained by the Counsel for the Appellants before their Lordships; but it is now admitted that on two occasions, at least, the conviction of the whole body of the parishioners is required by law, namely, the occasions of electing new Marguilliers, and the rendering of the accounts by the old Marguilliers. This is said to be a concession to the parishioners since the year 1843.

The fact is, that about this period an important law-suit was commenced, which was decided by the Queen's Bench in 1844-45.

The name of the case was "*Ex-parte Renouf*." The marginal note of the reporter is correct, and is as follows:—

"Les notables ont droit de participer à l'élection des Marguilliers.

"Les notables sont les paroissiens contribuables.

"Les Curé et marguilliers peuvent être contraints d'appeler les notables aux assemblées pour l'élection de marguilliers, au moyen d'un writ de mandamus.

"Le retour fait par le Curé et les marguilliers qu'ils ont offert d'admettre aux assemblées certaines personnes notables par leur état et leur rang, à l'exclusion de la généralité des paroissiens, est déclaré insuffisant et illégal."—(*Rev. de Juris.*, 1845-46. *Banc du Roi, Québec. Philippe Renouf. Requéant pour Mandamus.*)

After this decision it became impossible to deny that for certain purposes the consent of the parishioners was necessary, at all events in parishes in which there was not a custom to the contrary.

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But the principle upon which the decision is founded is important. It is clearly to the effect that in all questions of grave consequence affecting their parish, the parishioners have a right to be consulted. This appears to their Lordships to be the true doctrine derived from the reason of the thing and to be supported by the general analogies of the law relating to communes.

The argument that the concessions originally flowed from the Bishop, and that, therefore, the parishioners have no right in the matter, is really untenable. While the revenues of the parish were derived exclusively from a portion of the dimes; while the civil authority was not resorted to for the purpose of enforcing rates for the maintenance of the services and ornaments and property of the church; while what is now known as the office of Marguillier was unknown to the civil or municipal law; the argument might have been plausible; but since the corporation called the parish has been legally founded, and supported by civil and secular authority, every parishioner has an interest in the management of its property, and the argument is without foundation on principle.

Accordingly the books of authority, and the sentences of French Courts, greatly preponderate in favour of such rights of the parishioners as are claimed in this suit.

It is quite consistent with the existence of these rights that the Marguilliers chosen by the parishioners should be invested with a limited power sufficient for the transaction of the ordinary business of the parish, and for the supply of the ordinary necessities of divine worship.

The law can scarcely be stated with more perspicuity than it is in the *Nouveau Dénisart* (358-9), under the title, "Fabriques des Paroisses."

Some reference has already been made to the *Arrêt* in the case of *St. Jean en Grève* delivered in 1737, which the learned canonist *Durande de Maillane* refers to as a collection of the rules of law applicable to the rights of parishioners and the duty of marguilliers: articles 20, 21, 24.

The authority of the *Ancien Dénisart* (V. Marguilliers, p. 248, No. 42) is also very pertinent.

It would be useless to accumulate further authorities from French writers on this point.

It is plain that modern legislation in Canada has been founded upon the basis of this jurisprudence. By the Consolidated Statutes of Lower Canada, cap. 18, sec. 8 and 45 it is enacted.

The allegation that a contrary custom prevails in the parish of *Verchères* remains to be considered. At one time, no doubt, a great variety of usage and custom on this subject prevailed in France; and some variety has existed in Canada. Oral and documentary evidence with respect to the alleged custom in *Verchères* was produced before the Courts below. Their Lordships have examined the Schedules and Summary taken from the Registry on this subject which form a part of the Record before them.

There are certainly some errors and omissions in these documents; but their Lordships see no reason to suppose that such

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errors and omissions were intentional, or that the Curé is open to any charge of *mala fides* in this matter. But apart from this circumstance, the Courts below held, and, in the opinion of their Lordships, rightly held, not only that no such contrary custom had been established by the evidence, but that a custom of summoning the parishioners on all but the ordinary occasions of the parish was proved.

The result of their Lordships' examination of the history of and authorities on the first question is, that the matter of taking legal proceedings with respect to this road, inasmuch as it affected the property of the "fabrique" and incurred the responsibility of a lawsuit, was a matter of that gravity and importance which according to principle and authority required the previous "autorisation" of the parishioners duly convened for deliberation on the subject; and that there is no sufficient evidence of the existence of any custom in this parish which renders the general law inapplicable to it.

The remaining question, namely, whether it was competent to the Respondents to plead this nullity as a "fin de non recevoir" is really a question of pleading; and their Lordships would be very reluctant to interfere with the deliberate judgments of the two Canadian Courts respecting it. Their Lordships, however, have consulted various authorities on this subject, and find them to be such as fully to warrant the opinion of the Judges of the Courts below.

Thus Dalloz, in the earlier edition of his work. (Dalloz, Juris. Gen. du Royaume. Tit. Fabrique des Églises, Tom. 8, p. 14, s. 58).

It is obvious that no distinction in principle upon this question of pleading can be taken between the cases of the "Fabrique" and the Commune, and, accordingly, following this reference, their Lordships find that in his later edition of 1848, the author, under the title "Commune," tit. 5, c. 13, observes, first (November 1764).....

Dalloz examines at length the question whether, if "la fin de non recevoir" has not been invoked, the adversary of the "Commune" can avail himself of the nullity resulting from the defect of "autorisation." He observes that there have formerly been three schools of opinion upon this subject. According to one school this defect produced an absolute nullity, and could be alleged at any stage of the cause even before the Court of Cassation. According to the second school, the exception must have been taken before the Judges of First Instance.

Between these two schools of opinion came the third, of which Merlin was, in fact, the founder, and which ultimately triumphed. This distinguished French Jurist arrived at the conclusion that the objection must have been taken before the case reached the Court of Cassation, either before the Judges of the First or Second Instance.

Merlin, in his "Répertoire de Jurisprudence," titre "Nullité," § 2, "Par qui les nullités peuvent-elles être alléguées?" says:.....

And so M. Rolland de Villargues, in his comparatively recent work "Dictionnaire du Droit Civil," titre "Autorisation pour Plaider," observes:.....

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A category which embraces the present case, "*Le point*," this author adds, "*est constant*," and he refers to several judgments of the Court "*Cassation*" in support of his opinion.

Other authorities might be cited to the same effect.

Upon the whole, their Lordships are of opinion that upon both questions the Canadian Courts have come to a right decision, and that this appeal ought to be dismissed with costs. And they will humbly advise Her Majesty to this effect.

FALSE INVOICES

See CUSTOMS: forfeiture.

FAMILY NAME

See NAME.

FEUDAL TENURE**FEUDAL RIGHTS ON LAND ACQUIRED BY THE CROWN.**

LES SŒURS DE L'HÔTEL-DIEU DE MONTRÉAL V. MIDDLEMISS ¹

6. By the law of feudal tenure in France, introduced into Canada and confirmed by the *Quebec Act*, the acquisition by the Crown of lands held from or under a seignior as part of his fief extinguishes all feudal rights in those land, and gives to the seignior a mere right of indemnity recognised by the custom.

7. By the law as it existed up to the time of the Ordinance of Louis XIV, in 1667, in reference to which laws the parties in this cause contracted, the amount of that indemnity, when not determinable by legal custom or written law, was in case of land held by *roturiers*, one-fifth of the price. ²

FILIATION**LEGITIMATION OF CHILDREN.**

LA CLOCHE V. LA CLOCHE ³

8. According to the Coutume of Normandy, the law in force in Jersey, the proof of the subsequent marriage of the father and mother of an illegitimate child, coupled with the fact of the child being always acknowledged and living with them, was sufficient evidence, without any formal recognition of paternity by the father.

LORD JAMES, p. 98: — There was no authority cited to their Lordships, and no principle has been suggested to them, on which they can hold that there is any particular mode or form requisite to the

¹ Quebec, 1878 July 12, L. R. III Appeal Cases 1102.

² No citation is given from their Lordships' remarks as cases of this nature are not likely to occur again.

³ Jersey, 1882 June 28, IX Moore N. S. 87.

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solidity of such a recognition. The principle in all these cases is, that where a man marries a woman who has had an illegitimate child, whether that child is thenceforth to be considered the legitimate child of the man must depend on the only evidence which can generally be given of it; that is to say, the man's recognition of his paternity, if that is sufficiently and abundantly proved, it does not signify in what particular manner that recognition is effected. See **MARRIAGE**.

FIRE MARSHALS**CONSTITUTIONALITY.**THE QUEEN V. COOTE ¹

9. The Act of Quebec 31 Vict. ch. 32, "An Act to provide for the appointment of a Fire Marshall for the cities of Montreal and Quebec and to define his powers and duties" ² creating a court to enquire into the causes and origin of fires, with all the powers of any judge of session, recorder or coroner, including the power to cause the arrest of any suspected person, is constitutional and within the competency of the provincial legislature.

FOLLE ENCHÈRE

See **SALE**: *re-sale and delivery*.

FORFEITURE

See **CROWN LANDS, CUSTOMS**.

FOREIGN ENLISTMENT

See **INTERNATIONAL LAW**: *iusdem verbis*.

FORGERY

See **EVIDENCE**: *eodem verbo*.

FRAUD**EFFECT OF FRAUDULENT CONTRACT BETWEEN PARTIES.**SHAW V. JEFFERY ³

10. A supposed or proved fraudulent intention between two parties toward a third one cannot be taken into consideration in construing an instrument, as to the rights of the contracting parties between themselves, as the deed may be still binding between them.

THE LORD JUSTICE KNIGHT BRUCE, p. 454:—When an instrument between two parties has been entered into for a purpose which may be considered fraudulent as against some third person, it may yet be binding, according to the true construction of its language, as

¹ Quebec, 1873 March, IX Moore N. S. 463.

² Now article 2998 & seq. of the Consolidated Statute of the Province of Quebec

³ Lower Canada, 1860 June 16, XIII Moore 432.

EFFECT OF FRAUDULENT CONTRACT BETWEEN PARTIES.

between themselves. It has not been, and could not well be argued here that the instruments were to have no operation; but the supposed fraudulent intention as to third persons has been used for the purpose of determining which of several supposed constructions they were to have between the parties. This is not allowable. The instruments, therefore, must be examined in the usual way, to collect from their language, as accurately as may be, the rights which they conferred on the plaintiffs and defendants respectively.

P. 462:—This being their Lordships' opinion, founded on the instruments themselves, it is scarcely necessary to observe, that a mere suspicion of a fraudulent intention to protect the property against the just claims of other persons, will not suffice to show that the transaction was wholly colourable as between the plaintiff and defendant themselves, nor if the transaction is to be treated as a real transaction, such as it appears on the surface, as between themselves, which their Lordships consider it ought to be, will it be vitiated, and rendered of no avail, because it may have the effect of defeating the claims of other creditors of the plaintiffs.

EFFECT OF FRAUDULENT CONTRACT.PEASE V. GLOANEC ¹

11. A title of ownership which is perfect in law, though voidable for cause of fraud as to part, namely, the possession, cannot be treated differently from an ownership voidable as to the whole, but it is protected and preserves its effect by the interposition of a *bona fide* purchaser for valuable consideration.

SMITH V. HARRISON ET AL ²

12. An agreement was made between a shareholder of a bank and the majority of the other shareholders, to the effect that he was to continue himself and for his benefit the proceedings already taken in a claim of the company for a forfeiture of a mine. The agreement was in the following terms: "If you will not further interfere with the prosecution of my claims, if you will withdraw all your objections to it and all your opposition, if you will allow me to go on, then I will give everybody, except the bank, exactly their proportion of their shares which they have not got." The Judicial Committee held that this agreement was fraudulent and could not be allowed to stand in equity, and it was set aside.

LINDSAY PETROLEUM COMPANY V. HURD ³

13. Where two proprietors of a mineral land made an arrangement with a third party to the effect that this latter

¹ Admiralty, 1866 June 26, III Moore N. S. 557.

² Victoria, 1872 March 20, XXVII Law Times N. S. 189.

³ Ontario, 1874 January 19, L. R. V. P. O. 221.

EFFECT OF FRAUDULENT CONTRACT.

should form a company to buy the land from one of the proprietors, and that the other, acting as if he had no interest therein, should give a letter recommending the transactions so as to influence the company; and the three would divide the price in unequal shares, the Judicial Committee held this arrangement fraudulent and the deed of sale made to the company under this agreement null and void.

SIR BARNES PEACOCK, p. 239:—Now the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be reasserted in either of these cases, the lapse of time and delay are most material. But in every case if an argument against relief which otherwise would be just is founded upon mere delay that delay of course not amounting to a bar by any statute of limitation the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the act done during the interval which might either party and cause a balance of justice or injustice in taking the one course or the other so far as related to the remedy.

P. 243:—It is difficult to conceive anything more clearly fraudulent than for the owners of property to arm a person, whom they knew to be about to endeavour to find others to take up a purchase, whether as a company or otherwise with a document purporting to be an offer made by themselves as owners to sell at a fictitious price he is to propose other people to take up and to accept that offer as if it were the real price. If that be not the real price which the owners of the property expect to get, and if they were parties to an arrangement that the intermediate agent who is to induce others to accept the offer is himself to put a considerable part of the nominal price into his own pocket without any communication of the fact, the document is a dishonest and false document upon the face of it representing a false transaction only in order to deceive somebody.

URQUHART V. MACPHERSON¹

14. Fraud does not render a contract absolutely null, but voidable only.

SIR MONTAGUE E. SMITH, p. 837:—Contracts which may be impeached on the ground of fraud are not void, but voidable only at the option of the party, who is or may be injured by the fraud, subject to the condition that the other party, if the contract be disaffirmed, can be remitted to his former state.....

¹ Victoria, 1878 May 22, L. R. III Appeal Cases 821.

EFFECT OF FRAUDULENT CONTRACT.

If authority were wanted in support of a principle so common as that to which their Lordships have adverted, it may be found in the case which is referred to in the judgment of the court below: *Clarke v. Dickson*.¹ In that case Mr. Justice Crompton says: — "When once it is settled that a contract induced by fraud is not void, but voidable at the option of the party defrauded, it seems to me to follow that when that party exercises his option to rescind the contract, he must be in a state to rescind, that is, he must be in such a condition as to be able to put the parties into their original state before the contract."

INTERFERENCE OF COURTS.BLACHFORD V. CHRISTIAN²

15. A degree of weakness of mind, far below what would be necessary to justify a commission of lunacy, if it has been taken advantage of to procure the execution of a deed, will be sufficient ground for setting an important deed aside.

LORD WYNFORD, p. 77: — The law will not assist a man who is capable of taking care of his own interest, except in cases where he has been imposed upon by deceit, against which ordinary prudence could not protect him. If a person of ordinary understanding, on whom no fraud has been practised, makes an imprudent bargain, no Court of Justice can release him from it. Inadequacy of consideration is not a substantial ground for setting aside a conveyance of property; indeed, from the fluctuation in prices, owing principally to the gambling spirit of speculation that unhappily now prevails, it would be difficult to determine what is an inadequate price for anything that is sold: at the time of the sale, the buyer probably calculates on a rise on the value of the article bought, of which he would have the advantage, he must not therefore complain if his speculations are disappointed, and he becomes a loser instead of a gainer by his bargain. But those, who from imbecility of mind are incapable of taking care of themselves, are under the special protection of the law. The strongest mind cannot always contend with deceit and falsehood; a bargain, therefore, into which a weak one is drawn under the influence of either of these, ought not to be held valid, for the law requires that good faith should be observed in all transactions between man and man.

P. 81: — Deceit and fraud must be matters of proof, and of contradictory proof. The Court, whose duty it is to detect fraud, must not be fettered by rules. If it be so, fettered fraud will keep out of its reach.

¹ 1 E. B. & E. 148.

² Isle of Man, 1829 July 3, 1 Knapp 73.

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GAMING AND WAGERING

CONDITIONS. *See CONTRACT: construction.*

WAGERS IN INDIA.

RAMLOLL THACKOORSEYDASS V. SOOJUMNULL DHOUDMULL ¹

1. Under the common law of England, in force in Bom-
bay, an action may be maintained on a wager, although the
parties had no previous interest in the question on which it
is laid, if it be not against the interests or feeling of third
persons, and does not lead to indecent evidence, and is not
contrary to public policy.

¹ Bombay, 1848 Feb. 22, VI Moore 301.

WAGERS IN INDIA.

The Statute 8 and 9 Vict. ch. 109 does not extend to India, and there is no peculiar Hindoo law upon the subject.

DOOLUBDASS PETTAMIBERDASS & AL. V. RAMLOLL THACKOOR-SEYDASS¹

2. The parties, Hindoo merchants and bankers, made forty-five wager contracts on the average price which opium would bring at the next government sale at Calcutta, each party suspecting that the other might use means to bring the price on his side.

The Judicial Committee held, that the efforts made by one of the parties to raise the market by bidding themselves, were no fraud on the other, as such course was, according to the understanding of both parties, to be pursued, and the contract was not consequently voidable on that account, the market being open to all who would buy, whatever their object might be.

3. The fact of employing several agents to buy, who were all cognisant that their buying was only for the purpose of raising the price, did not constitute an illegal conspiracy, and did not render the sale voidable. This is not the case of puffers being employed. A puffer is not a real bidder, although it may appear so to the public, as by arrangement between him and the vendor, his bid is to go for nothing.

WITHDRAWAL OF WAGER.

TRIMBLE V. HILL²

4. The plaintiff deposited with the defendant £200 to abide the event of a match between a horse of the plaintiff and another horse belonging to a third party, but before the day fixed for the race, he gave notice to the defendant that he revoked the authority to pay over the money, and demanded the return of it. Their Lordships maintained that he was entitled to recover such deposit, the contract by way of wagering being null and void in law.

GARNISHEE**JUDGMENT AGAINST**

WILSON V. TRAIL³

5. A judgment cannot be rendered against a garnishee who has parted with the property seized, unless proof is

¹ Bombay, 1850 June 28, VII Moore 239.

² South Wales, 1879 Dec. 16, L. R. V Appeal Cases 342.

³ Victoria, 1869 July 8, L. R. III P. C. 33.

JUDGMENT AGAINST

made that the property attached belongs to the defendant, and a mere constructive ownership is not sufficient.

GIFT**FOR SCHOOL PURPOSES.****IN RE HODGSON'S SCHOOL ¹**

6. A provision in a deed of foundation which permits certain persons of the age of manhood to continue at the school, does not make the endowment of this charity less an "educational endowment" within the meaning of the Endowed Schools Act of 1869, than it would have been if no such privilege had been granted to those persons.

See LEGACY.

INTER VIVOS.**GOSNAHAN V. GRICE ²**

7. In the case of a gift of moveable property made by a deceased person, at the eve of his death, to a relative, the court will require clear evidence of the intention of the donor and of the delivery.

8. A person having a considerable amount of bank notes concealed in her stays and being on her deathbed took the stays and said to her cousin, who was standing by her bedside, that "she was going to give her these;" at the same time holding the stays in her hands. The relative then took the stays and put them at the foot of the bed; but on the deceased saying: "Don't leave them, take them, keep them, and take care of them;" she asked for the key of a box, and the deceased handed it to her; and thereupon she locked them up in the box. Immediately after the death of the deceased she took the bank notes out of the stays and replaced the stays in the box. She also took away a watch and several little articles belonging to the deceased, of which she gave no immediate account, nor did she mention the amount she had found in the stays.

The Judicial Committee having regard to the looseness of the alleged expressions used by the deceased of which the evidence itself was unsatisfactory, together with the conduct of the relative in taking other property of the deceased, held, that the circumstances could not be considered to be such a delivery as constituted a *donatio mortis causa*.

LORD CHELMSFORD, p. 223:—Cases of this kind demand the strictest scrutiny. So many opportunities, and such strong temptations, present themselves to unscrupulous persons to pretend these

¹ 1878 June 6, L. R. III Appeal Cases 857.

² Isle of Man, 1862 July 12, XV Moore 215.

INTER VIVOS.

deathbed donations, that there is always danger of having an entirely fabricated case set up. And, without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of persons languishing in a mortal illness, and, by a slight change of words, to convert their expressions of intended benefit into an actual gift of property, that no case of this description ought to prevail, unless it is supported by evidence of the clearest and most unequivocal character. See next case *Richer v. Voyer*.

PAROL EVIDENCE IN DONS MANUELS. See EVIDENCE: *iisdem verbis*.

POSSESSION IN DONS MANUELS.

RICHER V. VOYER¹

9. The *Civil Code*, article 776, provides by way of exception to the rule, that gifts called *dons manuels* may be made of moveables by private writings or verbal agreement, provided they are accompanied by delivery. The Privy Council held that the anterior possession of the property so given is equivalent to delivery at the time of the gift, although the former possession was for another purpose.

10. *Dons manuels* must be clearly proved, especially when there is a relation between the donor and the donee such as that of principal and agent.

SIR MONTAGUE E. SMITH, p. 477:—It was further contended for the Respondent that the delivery was ineffectual in point of law, on the ground that it was made some time before the alleged gift, and with another object. The point was fully and ably discussed, at the Bar, with the result that it appears to be the law of Canada that anterior possession of property which can be the subject of "*don manuel*" is equivalent to delivery at the time of the gift, although the former possession was for another purpose. (See Ricard, *Traité des donations*, chap. IV, sec. 2, dist. 1.)

Demolombe is very clear upon this point. He says: (*Traité des Donations*, vol. III, livre III, titre 2, chap. 4, sec. 73.)

Assuming, then, there was a sufficient delivery of the certificate to satisfy the requirement of the law, the next question to be considered is, whether the agreement of gift is proved. On this point the indorsement and delivery are equivocal facts, consistent by themselves with the position of the Appellant either as agent or donor. It was, indeed, contended that, as he held a power of attorney, the indorsement was not required to enable him to receive the interest, but the bank, notwithstanding this was so, may have desired to have Madame *Voyer's* own signature.

Mr. Justice Caron, in his reasons, has tersely stated the Appellant's position:—

"Il a déposé comme procureur, c'est à lui à établir le changement dans son titre et sa possession. L'endossement seul et dénué d'explication n'a pas cet effet."

¹ Quebec, 1874 May 2, L. R. V P. Q. 461.

POSSESSION IN DONS MANUELS.

The Appellant attempted to prove that the certificate was the only document of Madame Voyer he had in his possession and that she kept all others in her own custody. The evidence of this fact is weak; but, assuming it to be proved, it would not conclusively negative the presumption that he held it as her agent. It is plain the Bank required the production of the certificate whenever interest was paid, to enable an indorsement of the payment to be made upon it. Under these circumstances the maxim of the French law "la possession vaut titre" cannot be invoked with effect.

The evidence of the gift thus becomes reduced to testimony of witnesses who speak of conversations with Madame Voyer.

Exception was taken by the Respondents in the Courts below to the admissibility of this evidence, and it seems to have been rejected; but whether on the ground that it was wholly inadmissible, or was deemed to be, when examined, irrelevant as affording no proof of a present gift, does not appear.

It seems to their Lordships that the parol testimony of witnesses is, of necessity, admissible to prove the agreement in certain cases coming within the class of "dons manuels," since it would be incompatible with the law, which allows such gifts to be made by verbal agreement, to exclude the only evidence by which such an agreement can be established.

But assuming the testimony given in this case to be fully admissible, their Lordships have come to the conclusion that it is insufficient to prove with reasonable certainty that an absolute gift of this property was ever made by Madame Voyer to the Appellant. The witnesses who speak to the conversations do not profess to prove words of present gift. The utmost that can be contended for is, that they give evidence of statements of Madame Voyer, which, it is said, amount to an acknowledgment that she had made it; but these statements are in themselves so vague, and the occasions on which they were made are so indistinctly described, that they cannot be safely relied on for proof of the gift, especially when they are not supported by the presumptions which arise from other facts appearing in the case.

In the first place, the manner of the deposit is opposed to the presumption that a gift of it was made at that time. The money was deposited in the name of Madame Voyer, and the account opened with her. It is not clear, from the Appellant's statements, at what subsequent time he asserts the gift to have been made; but he certainly means to allege it was before the first interest was received by him; if this be so, his offer to pay over that interest to Madame Voyer is unaccountable, and entirely opposed to his pretension that an absolute gift had before that time been made and accepted. It is said by him that he never accounted to Madame Voyer for the subsequent interest, but the manner of his accounting with her is not shown. All that appears is, that on two occasions after the deposit, she declared herself satisfied with the administration of her affairs, and gave him formal discharges before a notary.

Again, it does not seem probable that the gift of a large sum of money should have been made to the Appellant in recompense, as it

PONNEMION IN DONN MANUELS.

is said, of his services so soon after Madame Voyer had given him a valuable piece of land to reward him for them, or that, if it were intended, the Appellant, who knew the law, should be content to rely on the mere indorsement of the certificate as the sole proof of the new gift.

It could not be suggested that the motive of the gift was to assist the Appellant in his building operations, for the fact is beyond dispute that he borrowed money at 8 per cent, for this purpose, whilst this money remained on deposit at 4 per cent only.

Further, he neither drew out the money, nor changed the account to his own name, nor gave notice to the bank of the transfer in Madame Voyer's lifetime. It is difficult to suppose that he was not aware of the importance of being able to point to some other act to mark a change of possession, especially having regard to his double position of agent and donee: or that he would have neglected to take some step with that object if he had obtained an absolute and perfect gift of the money.

Their Lordships, whilst holding that the evidence fails to establish a valid gift, do not wish to exclude the supposition that something may have passed between Madame Voyer and the Appellant which led him to take a sanguine view of her intention to benefit him. But, be that as it may, it is obvious that in cases where formal authentication by notarial act is dispensed with, it would be dangerous for the Courts to support gifts except upon plain and conclusive evidence of the agreement; and it would be especially unsafe to do so where an agent sets up a gift from his principal and mainly relies for proof of it upon the possession of a document which was, or at least may have been, originally entrusted to him for the purposes of his agency.

REVOCATION BY BIRTH OF CHILDREN.- SYMES v. CUVILLIER ¹

11. According to the old French law, in force in the Province of Quebec, before the Code Civil, the gift *inter vivos* is not revocable by the birth of children to the donor, *par survenance d'enfants*, when the gift is not excessive in relation to the property of the donor, and if it may be presumed that the donor would have made it if she had contemplated children.

12. The Ordinance of 1731 *Si unquam* establishing in France the revocation of gifts *inter vivos* by *survenance d'enfants*, is not law in the Province of Quebec, not having been therein registered.

SIR MONTAGUE E. SMITH, p. 149: —To ascertain the law of Canada on this subject at the time the donation was made, it has been necessary to inquire into the law as it existed prior to the coming into force of the Civil Code of Lower Canada, which contains the following article 812,

¹ Quebec, 1879 Feb. 25, L. R. V Appeal Cases 138.

REVOCATION OF BIRTH OF CHILDREN.

If the Code governed the question, this article would be decisive in favour of the respondents; but the Code did not come into force until the 1st of August 1866, about two months after the date of the donation. It was, indeed, contended by the counsel for the respondents that its provisions on this subject became the law of the Province upon the passing of the Act. 29 Vict. c. 41, which sanctioned them; but their Lordships are clearly of opinion, for the reasons given by them during the argument, that this is not so, and that these provisions had not the force of law until the time fixed for the coming into operation of the Code.

The discussion at the bar, which took a wide range, and was ably conducted on both sides, was directed, in the first place, to the consideration of the law of France. It appears that the question of the revocation of gifts by the birth of children was for several centuries a fertile subject of discussion and controversy amongst French jurists. This controversy was complicated by the varying jurisprudence of different Parliaments. The law which is to be principally regarded in deciding this case is that of the Parliament of Paris; the Edit of Louis XV (1663) which created the "*Conseil Supérieur*," and established courts of justice for Lower Canada, having directed that the "*Coutumes de Paris*" should be the general law of the Province: The law of France was drawn from a rule in the Justinian Code, usually cited as the law "*Si unquam*," which is in the following terms.

And their Lordships here established by the following authorities and by discussion what was the law of France: Cujas' Opera postuma, 9 vol. 31 c.; Merlin Rep. vo Donation, sec. 7; Despiesses, part I, tit. 14, art. 4 sub. sect. 2, Edit. 1750; Arrêts de Papon, Donations, livre XI, art. XIX; Damours, Conférence de l'Ordonnance, p. 324; Sallé, Ordonnance de 1731; De Ferrière, La Coutume de Paris, vol. III, tit. 13; Ricard, Donations, tit. 3. c. 5, sec. 4; Furgole, Ordonnance de 1731.

P. 157:—Considering, then, that this Ordinance enacts a new law on the point in question, it would not be of force in Canada unless it had been registered there. The appellants' counsel relied on the injunction of the Ordinance requiring it to be obeyed "*dans tout notre royaume, terres et pays de notre obéissance*," but a royal Ordinance, published after the establishment of "*Le Conseil Supérieur*" in Canada by the Edict of 1663, did not take effect in that province *proprio vigore* until it was registered: *Hutchinson v. Gillepsie*, 4 Moore's P. C. 378; *Les Seurs Hospitalières de St. Joseph v. Middlemiss*, 3 Appeal Cases 1119.

GOVERNOR

RIGHT OF VETO.

In re THE STATES OF JERSEY ¹

13. The States of Jersey passed an Act for the erection of a public lunatic asylum which enacted that, provisionally, the

¹ Jersey, 1862 May 14, XV Moore 195.

RIGHT OF VETO.

insane be placed, for three years, in a private establishment at the charge of the Island and of the parishes. The lieutenant-governor placed his veto on the Act and reported the Act to the Secretary of State who approved it. The Judicial Committee maintained the veto of the lieutenant-governor as constitutional, the care of the insane being a matter of special interest vested into the crown.

POWERS AND PRIVILEGES OFCAMERON V. KYTE ¹

14. The governor of a colony has only the authority expressly given him by his commission, no delegation of sovereign authority is implied unless by the instructions of the crown to him, and an act done by him on his own authority, is not equivalent to such an act done by the crown itself, and is consequently not valid.

15. The non-objection on the part of the crown to a notification or proclamation issued by a governor of one of its ceded colonies does not imply that the governor had authority in the subject of the proclamation, nor will its non-interference render the proclamation valid on the ground of acquiescence.

MR. BARON PARKE, p. 343 :—If a Governor had, by virtue of that appointment, the whole sovereignty of the colony delegated to him as a Viceroy, and represented the King in the government of that colony, there would be good reason to contend that an act of sovereignty done by him would be valid and obligatory upon the subject living within his government, provided the act would be valid if done by the Sovereign himself, though such act might not be in conformity with the instructions which the Governor had received for the regulation of his own conduct. The breach of those instructions might well be contended on this supposition to be matter resting between the Sovereign and his Deputy, rendering the latter liable to censure or punishment, but not affecting the validity of the act done. But if the Governor be an officer, merely with a limited authority from the Crown, his assumption of an act of sovereign power, out of the limits of the authority, so given to him, would be purely void, and the Courts of the colony, over which he presided, could not give it any legal effect. We think the office of Governor is of the latter description, for no authority or dictum has been cited before us to show that a Governor can be considered as having delegation of the whole royal power, in any colony, as between him and the subject, when it is not expressly given by his commission. And we are not aware that any commission to colonial Governors conveys such an extensive authority.

¹ Berbice, 1835 Dec. 21, III Knapp 332.

POWERS AND PRIVILEGES OF

HILL V. BIGGE¹

16. This action was on an obligation. The plea set up that the defendant was, at the time of the action, and still continued to be lieutenant-governor of the Island, and as such not liable to be sued. This plea was overruled, although his person is not liable to be taken in execution while on service.

LORD BROUGHAM, p. 410:—If it be said that the Governor of a colony is *quasi* Sovereign, the answer is, that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the officer to execute the specific powers with which that commission clothes him: "The Governor" said Lord chief justice *De Grey* in *Fabrigas v. Mostyn*, "is the King's servant: his commission is from him, and he is to execute the powers he is invested with under that commission."... Nor must we forget, in reference to the position of the supreme power in the state, that by our laws and constitution it is not in the Sovereign, but in the Parliament, the Sovereign himself being liable to be sued, though in a particular manner; and if his liability be such, even as much restricted as some have occasionally maintained, it would still be greater than the appellant's argument supposes the liability of a Governor to be.

The consequences imagined to follow from holding the Governors liable to action like their fellow subjects are incorrectly stated, and, if true, would not decide the question. For it by no means follows that because an action may be maintained and judgment recovered, therefore the same process must issue against the Governor as against another person, pending his government. His being liable to be taken in execution is not the necessary consequence of his being liable to have a judgment against him. There were anciently more instances than happily now, of persons privileged from legal process; but there still are some such exemptions, as privilege of Peerage and of Parliament, and of persons in attendance upon the Sovereign, and upon courts of justice. None of these privileges protect from suits, all more or less protect from personal arrest in execution of a judgment recovered by suit. Indeed the old, and we may now say obsolete writ of protection, which the king granted to his servants and debtors, purported to be a protection from all pleas and suits; yet the courts held that no one should thereby be delayed in his action, but only that execution should be stayed after judgment. It may be observed in passing, that those protections were a provision made by the old law for the security of persons in the foreign service of the Crown: as commanders of armies, ambassadors, and doubtless governors of the continental dominions also. It therefore is not at all necessary that in holding a Governor liable to be sued, we should hold his person liable to arrest while on service; that is, while resident in his government. It is not even necessary that we should meet the suggestion of his goods in all

¹ Island of Trinidad, 1841 Dec. 4, III Moore 463.

POWERS AND PRIVILEGES OF

circumstances being liable to be taken in execution, though that is subject to a different consideration.

MUSGRAVE v. PULIDO ¹

17. The ordinary courts of justice have the right to determine whether any act of power done by a governor of a colony is within the limits of his authority and therefore an act of state.

18. The governor of a colony has only the power derived from his commission, and does not possess general sovereign power.

SIR MONTAGUE E. SMITH, p. 111:—It is apparent from these authorities that the Governor of a colony (in ordinary cases) cannot be regarded as a Vice-roy: nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that, for acts of power done by a Governor and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of state. When questions of this kind arise it must necessarily be within the province of municipal courts to determine the true character of the acts done by a Governor though it may be that when it is established that the particular act in question is really an action of state policy done under the authority of the Crown, the defence is complete, and the courts can take no further cognizance of it. It is unnecessary, on this demurrer, to consider how far a Governor when acting within the limits of his authority, but mistakenly, is protected.

GRANT

See CROWN LANDS: possession.

¹ Jamaica, 1879 Dec. 13, L. R. V Appeal Cases 102.

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See WRIT OF PREROGATIVE: *idem verbis.*

HANDWRITING

See EVIDENCE.

HARBOUR BOARD

RESPONSIBILITY OF

SHAW & AL. V. TIMARU HARBOUR BOARD¹

1. Although the respondents, being the Harbour Board for Timaru, had by statute jurisdiction over the port, and could license pilots, they had no right to make pilotage contracts

¹ New Zealand, 1890 April 30, L. R. XV Appeal Cases 429.

RESPONSIBILITY.

with a private vessel, and therefore, could not be held responsible in damages for the default of their harbour master who had acted as pilot for a vessel with their consent.

HUSBAND AND WIFE

See *MARRIAGE : rights and liabilities of married women.*

HYPOTHEC**CONSTRUCTION OF DEBENTURES.**

WICKHAM V. NEW BRUNSWICK AND CANADA RAILWAY CO. ¹

2. The company respondent borrowed money on debentures as security. These were termed "Mortgage Debentures," the principal and interest thereon being made a charge on and secured by all moneys arising from the sale of the lands of the company, all future calls on shareholders, and all tolls and sums of money which should become due to it, and by the plant and rolling-stock, with power of entry and possession of the same, upon failure by the company to pay the principal and interest as therein specified; but with a proviso that nothing therein contained should be held to limit the power of sale on appropriation by the company of any of the lands of the company, nor constitute a charge on the same. These bonds were not registered. The Judicial Committee held that such debentures did not constitute a charge in the nature of an equitable mortgage on the lands of the company, so as to give the holders of such debentures a right to restrain the sale of the lands by judgment creditors of the company, or any title to the proceeds of the lands when sold, as the sale by the sheriff under an execution is a sale by the law, and not by the company.

EXTENT OF

FENTON V. BLACKWOOD ET AL ²

3. The respondents endorsed bills of exchange in behalf of the appellant, for a sum of £18,700, which bills were discounted by a bank. This endorsement was secured by a mortgage on real estate, and the deed mentioned that it was to cover this bill of exchange and any other bills or notes that the respondents might make or indorse either by way of renewal or in substitution of the original bills, to cover also the interest or any other account whatever incidental thereto or consequent thereon. The appellant also mortgaged a stock

¹ New Brunswick, 1865 Dec. 22, III Moore N. S. 416.

² Victoria, 1874 Jan. 29, L. R. V. P. C. 167.

EXTENT OF

of horses and cattle agreeing to pay all license fees, rents, assessments, penalties and other charges on the said stations and stock, and in default, the mortgagees had the right to pay them and be secured by the mortgage. The Judicial Committee held that the mortgagees, under this agreement, had the right to charge discount, interest, rents, licenses, paid by them, but they could not charge sheep-mark.

EXTINCTION OFWILKINSON V. SIMSON ¹

4. The mortgage or pledge given as security for a debt becomes extinct by the full payment of the debt to which the mortgage is attached; and a person paying the debt of another, as drawer on bills of exchange for which a hypothec had been given, is not subrogated in the place of the mortgagee, unless he pays upon an express understanding that he should, as the payment of the bills of exchange extinguishes the mortgage.

FOR DAMAGES.CAMERON V. FRASER ²

5. Where a mortgage has been given to secure the payment of bills of exchange with interest and damages accruing thereon, the court below maintained the mortgagee's preferential right for the capital and interest as representing the purchase price, but refused it for the damages. The Judicial Committee reversed that judgment and held the mortgage good and the claim for damages preferential as for the capital and interest.

HYPOTHECARY ACTION.BEAUCE V. MUTER ³

6. The registration of a judgment against the estate of the debtor constitutes a general hypothec; and a possessor who derives his title from the original debtor, although there has been no renewal of registration against him, is subject to an hypothecary action.

7. When an Order in Council requires the renewal of registration for all mortgages or incumbrances on real estate, such renewal against the original owner is effective against subsequent purchasers.

¹ British Guiana, 1838 Feb. 24, II Moore 275.

² British Guiana, 1842 Feb. 5, IV Moore 1.

³ St. Lucia, 1845 Jan. 17, V Moore 69.

JUDICIAL.

LANG V. REID ¹

8. By the French law prevailing in *Mauritius*, a judgment obtained against a debtor, and duly registered, constitutes a specific charge or hypothec on the debtor's real estate, with priority according to date.

PAYMENTS ON ACCOUNT.

NATIONAL BANK OF AUSTRALASIA V. UNITED HAND-IN-HAND AND BAND OF HOPE COMPANY ²

9. A mortgagee, who is in possession of the mortgaged property, must account to the mortgagor for his actual receipts with interest, and for all he has received from third parties out of the estate.

10. If the estate is sold at an under value by the fault or negligence of the mortgagee in possession, he is liable for the full value of the property to the mortgagor.

LEWIN V. WILSON ³

11. The principle that the only person by whom a payment can be made to prevent foreclosure from being barred is the mortgagor, or some person in privity of estate with him, or the agent of one of them, must be qualified so as to include those who have the right or the interest to make payments, by the deed of mortgage. *Chinnery v. Evans*, 11 H. L. C. 115; *Harlock v. Ashberry*, ch. 19, p. 539; *Bolding v. Lane*, 1 De G. J. & S. 122; *Toft v. Stephenson*, 1 De G. M. & G. 28.

PAYMENT OF MORTGAGE HELD IN ANOTHER COUNTRY. See INTERNATIONAL LAW: *iusdem verbis*.
RANK OF

BROWN V. ANDERSON ⁴

12. The appellant was a prior mortgagee with right to the consignments, for money advanced and supplies furnished to the owners of the estate hypothecated. The suit was brought against the purchaser of the estate for the balance of an account. The heirs of the original mortgagor intervened and claimed to be paid before the mortgagee of the price of the sale to respondent. The question to determine was the respective rank of the appellant and respondent as mortgagees, and was one of fact only. The Privy Council reversing the decree of the court below, held that the proceeds of the estate were first applicable to sums due for supplies and next in payment of the mortgage debt.

¹ *Mauritius*, 1858 June 16, XII Moore 72.

² *Victoria*, 1879 June 14, L. R. IV Appeal Cases 391.

³ S. O. New Brunswick, 1886 June 25, L. R. XI Appeal Cases 639.

⁴ *Trinidad*, 1838 Feb. 19, II Moore 249.

RANK OF

GORDON V. HORSFALL ¹

13. There were two suits by hypothecary creditors, each claiming priority on questions of fact. In determining the respective rights of each of them, the Judicial Committee held, that a subsequent creditor cannot sustain an action claiming general administration and account against a prior creditor, without offering redemption which is the only relief in equity.

REDEMPTION OF

BIRNIE V. CAYSTILE ²

14. In the Isle of Man, since the statute of 1835, a mortgage may be redeemed after twenty-one years.

15. A mortgage of copyholds of the tenure of Quarter lands, cannot be foreclosed, but the mortgagee may sue out judgment and execution, and in virtue of such judgment and execution cause the mortgagor's premises to be sold for payment of the mortgage.

BANK OF NEW SOUTH WALES V. O'CONNOR ³

16. A mortgagee is entitled to his principal and interest, and to the ordinary charges and expenses connected with the security. He is also entitled as of right to the costs properly incident to an action for foreclosure or redemption, though he may forfeit those costs by misconduct, and may even have to pay the costs of such an action in a case where he has acted vexatiously or unreasonably. *Cotterell v. Stratton* L. R. 8 Ch. 295.

17. Where a deposit of titles has created a charge to secure a loan, an action in detinue cannot be maintained before the payment of principal and interest.

18. A tender properly made for the redemption of a mortgage and rejected is not equivalent to payment in such case. *Postlethwaite v. Blythe*, 2 Sm. 256; *Chilton v. Currington*, 15 C. B. 95, 730; 16 C. B. 206.

RIGHT OF ASSIGNEE.

MACRAE V. GOODMAN ⁴

19. In an action where the question in issue was as to the rank between the mortgagees, the Judicial Committee held, that the *lex Anastasiensia*, in British Guiana, under which an assignee for a valuable consideration of a debt or chose in action, secured by mortgage, could not recover more than

¹ Jamaica, 1846 Dec. 8, V Moore 393.

² Isle of Man, 1854 Nov. 28, IX Moore 303.

³ Victoria, 1889 March 9, L. R. XIV Appeal Cases 273.

⁴ British Guiana, 1846 May 14, V Moore 315.

RIGHT OF ASSIGNEE.

the amount of the consideration money, actually paid to the assignee, with legal interest from the time of payment, is not applicable to a *bona fide* purchaser of a mortgage.

TRANSFER OFWALKER V. JONES ¹

20. The assignee of a mortgagee cannot stand in any different character, or hold any different position, from that of the mortgagee himself, although the mortgagor may not have been a party to the assignment; and every mortgagor has the right to have a re-conveyance of the mortgaged property upon payment of the money due upon the mortgage, and the mortgagee is charged with the duty of making such re-conveyance upon such payment being made.

21. Where, therefore, a mortgagee having, besides the property mortgaged, certain promissory notes made by the mortgagor, as collateral security for his debt, transferred the mortgage without assigning the collateral securities, the Judicial Committee held that he was not entitled so to sever the debt from the security, and an injunction was granted against his proceeding at law to recover the amount of one of the notes, pending a suit instituted by the mortgagor, to redeem and to settle the equities of the parties.

USURIOUS CHARGES.SAYERS V. WHITFIELD ²

22. All charges against a mortgaged estate which have a tendency to usury should be disallowed, but it is not usurious for a mortgagee to demand the consignment in his favour of the produce of the mortgaged estate, nor to charge a commission on the sale of such produce.

Chambers v. Goldwin, 9 *Vesey* 271; *Langstaff v. Fenwick*, 10 *Vesey* 405; *Bunberry v. Winter*, 1 *Jac. & Walk*, 257 to 261; *Strickland v. Brickwood*, 1 *Knapp P. C.*, 143, note *; *Scott v. Nesbitt*, 141 *Ves. Jur.* 438.

PRESCRIPTION OF See PRESCRIPTION: of mortgaged estate.

HIGHWAY

DEDICATION.DE CARTERET V. BAUDAINS ³

23. According to Jersey law there can be no dedication without an express grant recorded in the Royal court.

¹ New South Wales, 1865 March 13, III Moore N. S. 397.

² St. Vincent, 1829 Aug. 3, 1 *Knapp* 133.

³ Jersey, 1886 April 6, L. R. Appeal Cases 214.

LEVEL OF STREET. See EXPROPRIATION : *valuation of property*.

PRESCRIPTION OF See PRESCRIPTION : *eodem verbo*.

PUBLIC STREETS AND SQUARES.

LA CHEVROTIÈRE V. LA CITÉ DE MONTREAL ¹

24. By Canadian as by English and Scotch law when a street or road is used by the public during more than ten years, there is sufficient dedication on the part of the owner to convert it into a public highway, and the soil of the road becomes vested in the crown or other public trustee in trust for that public use.

25. The use by the public of a square, for public purposes, during ten years, prescribed the soil in behalf of the public corporation. (28 Vict., c. 72, s. 10, subs. 6.)

LORD FITZGERALD, p. 157:—Several questions of very considerable importance and difficulty have been raised before this Committee. One was suggested by one of their Lordships—whether the condition was apportionable, and if not apportionable, whether the demandants could sue, not being the owners of nor interested in the whole of the property which is the subject-matter of the condition. On that question also, their Lordships do not find it necessary, in their present judgment, to express any opinion.

There were also questions whether the condition of re-entry was void in its inception, whether it was a condition of re-entry properly, or was merely inserted in the deed of gift *in terrorem*, and merely *comminatoire*.

There was also a question of prescription and other questions in the case upon which their Lordships do not propose to express any opinion, as the appeal may be disposed of on another and satisfactory ground.

The magistrates of Montreal having got possession of the land under that deed of 1803, and converted it into a public market, we come next to the Ordinance of 4th Vict., by which the magistrates ceased to be the managing body of the city of Montreal, and were replaced by a quasi-corporate body. That leads to the 8 Vict. c. 59. The magistrates in Montreal had accepted this deed of 1803, which, whether it was for valuable consideration, or a simple voluntary deed, was a deed of grant for ever. The words are "*maintenant et à toujours*"—but subject to the condition, whatever the effect of it was. Therefore, at the time of the incorporation of the city, the magistrates were, as trustees for the public, in ownership of this land in perpetuity, subject to the condition, with this market upon it; and over this public market place, not inhabitants of the city alone, but the public at large had acquired considerable rights.

That being the position of affairs, there came the Canadian statute of 8 Vict. c. 59; that statute is not a general Act dealing with all corporations, but with Montreal alone. It is to give greater potency

¹ Quebec, 1886 Nov. 16, XII L. R. Appeal Cases 149.

PUBLIC STREETS AND SQUARES.

and effect to the incorporation of the city of Montreal and to enlarge the powers of the corporate body. It gives them very extensive powers over the city, and amongst other things it says, in the 50th section, that they shall have power of "changing the site of any "market or market place within the said city, or to establish any "new market or market place, or to abolish any market or market "place now in existence, or hereafter to be in existence in the said "city, or to appropriate the site thereof, or any part of such site "for any other public purpose whatever, any law, statute, or usage "to the contrary notwithstanding; saving to any party aggrieved "by any act of the said council respecting any such market or market place any remedy such party may by law have against the "corporation of the said city for any damage by such party, sustained by reason of such act" of the corporation.

Now it was contended that, acting under that statute and converting this market place to another public purpose, was no breach of the condition, and that the effect of the statute was to discharge the condition and leave it open to the corporation, acting for the public interests, to appropriate the site of that market place to any other public purpose, but subject to a claim for compensation by the demandant here and the parties he represents, if they had title, and had been injured by the act of the corporation. Now upon this very important question as to the effect of this statute, their Lordships do not think that it is necessary at present to express any opinion.

Proceeding under the powers that they had so obtained in December 1847, the first by-law was made. In that, the corporation indicate their intention to abolish this market and apply the site to another public purpose, and their Lordships can have no doubt, that in taking that step, the corporation were moved only by considerations of public good. They found it necessary, probably, to supply the growing city with a larger market place, for Montreal in 1847 was a very different place from the Montreal of 1803, growing and extending every day, and still growing and becoming one of the most beautiful cities in the world. They very likely thought that a larger market place was necessary, but that they ought to retain the space occupied by the market as an open space for the public good and the public health, and hence they converted it into the Place Jacques Cartier.

In January 1847 the act of conversion was made complete, and there was also a subsequent by-law by which they directed that the new place should be henceforward called the Place Jacques-Cartier.

Their Lordships assume also, for the purposes of the case, that, upon the happening of these events, whatever rights if any the demandant or those he represents had under the condition in the grant of 1803 came into existence in January 1847, that is, that they were then entitled, if at all entitled, to put their claims in force and to institute a proceeding against the Corporation to take advantage of the condition annexed to the gift of 1803, and to resume possession of this plot of ground or to get compensation for the act of the corporation. But they did not do so, and things went on as before from 1847 to 1852. The effect of the transaction of January 1847 was, to

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convert, by the act of the corporation, the old market place into a public square which the citizens of Montreal and the public had a right to use.

Things continued in that condition down to 1852, when Perrin instituted his action. That action may be described with substantial accuracy as similar to the present. It made the same case. The present demandant is the assignee of Perrin's interest. Perrin's action the corporation defended. They put in exceptions similar, save in one respect, to those now before their Lordships. It was allowed to sleep for some six years. The case was then set down for hearing before the proper court in Canada, and was dismissed, either for want of prosecution, or on the merits. Perrin never instituted any other proceeding. He appears to have lain dormant for 19 years, and in 1876, for a nominal sum, to have assigned this large claim over to the present demandant. In all that interval, the public had been using this public place and it was not using it privately, it was not *clam*, but it was openly and as of right, without any interruption by the parties or any of them who are now represented to have had the property in the place. Mr. Fullarton relied very much on this action of Perrin's and a petition that came in from some outside parties. Who they were we do not know; but it was a petition which was not acted upon, and it is open to the suggestion that it was the existence of that petition that suggested the action of François Perrin. However, Perrin never took a step further, and it appears to their Lordships that the absence of any contestation of the right of the public to use this place as a public highway is clear evidence of acquiescence in the public right, or rather of abandonment of the claim, if any, that François Perrin had.

Their Lordships desire to point out that, independently of the statutes, there is evidence of a long-continued user by the public and an abandonment of right by those who could have disputed the user by the public, sufficient to sustain at common law the public right. There seems to be no difference between the law of Lower Canada and the law of England and of Scotland in that respect. The public had enjoyed the right from 1847 down to the commencement of the present action. They had enjoyed it openly, claimed it, not privately, but adversely, and as of right, and in the meantime, there had not been a single step on the part of the present claimant, or those from whom he derives title, to dispute that right, but, on the contrary, there was the amplest evidence of acquiescence in the public enjoyment. There has been made out, independently of any statutory provision, an ample case of user on the one side and dedication or abandonment on the other which would constitute the place in question a public place over which, not the citizens of Canada or Montreal alone, but the public at large, had rights, which the law would give effect to, independently of the provisions of any statute.

The 18 Vict. c. 100, Lower Canada, does not apply to Montreal, but deserves attention. Montreal is excepted from the operation of that Act, but it applies to every part of Lower Canada save Montreal and some other excepted places, and it contains this provision, that "every road declared a public highway by any process verbal,

PUBLIC STREETS AND SQUARES.

"by-law or order of any grand voyer, warden, commissioner or municipal council legally made and in force when this Act shall commence shall be held to be a road within the meaning of this Act until it be otherwise ordered by competent authority." That was the Act adverted to by Chief Justice Dorion. He intended to refer to the 23 Vict. c. 72, which applies to Montreal alone. It deals with the property of Montreal. It deals with the powers of the corporation and extends them beyond the Act of the 8 Vict. In sub-section 6 of section 10 of that Act (23 Vict. c. 72) there is this special provision :—"The said council" (that is the council of Montreal) "shall also have power to cause such of the streets, lanes, alleys, highways, and public squares in the said city, or any part or parts thereof, as shall not have been heretofore recorded or sufficiently described, or shall have been opened for public use during 10 years but not recorded, to be ascertained, described, and entered of record in a book to be kept for that purpose by the city surveyor of the said city, and the same, when so entered of record, shall be public highways or grounds; and the record thereof shall in all cases be held and taken as evidence for their being such public highways and grounds."

Proceeding under this Act, the corporation did in 1865 register the Place Jacques Cartier as a public place of the city. Their Lordships have no doubt that the registration was valid, and has been amply proved. If any objection had been taken at the trial before the Canadian Judge, it would have been the easiest thing possible to produce the original book, but a certified copy of the entry of registration was admitted in its place.

The Place Jacques Cartier had been from 1847 up to 1865 (more than 10 years before registration) enjoyed by the public as a public way and it was enjoyed as a public way more than 10 years after the registration and before the present action was commenced; and it seems to their Lordships that the case comes within the express language of that statute, and their Lordships have no doubt that, when the local Legislature passed this Act, they knew the state of things in the city, intended to provide for it, and did provide for it in strong and emphatic language, saying, that when a street or road should have been opened for public use during 10 years and placed upon the register, it should be a public highway.

Their Lordships are of opinion that, even if the common law question did not arise, still, there having been antecedent to this registration, and posterior to the registration, the statutable time during which the place should be used as a public street to give operation to the statute, the statute then applies, and upon that registration, the Place "Jacques Cartier" became a public highway. There is a distinction between the Canadian law and the law of this country as to public highways. The Canadian law agrees rather with the law of Scotland, which is founded on the civil law, namely, that when a street or road becomes a public highway, the soil of the road is vested in the Crown, if there is no other public trustee, or, if there is a corporate body that fills the position of trustee, then in that corporate body in trust for that pu-

PUBLIC STREETS AND SQUARES.

public use. It was admitted in the argument for the appellant that such was the law of Lower Canada.

Their Lordships being of that opinion, which is in accordance with the principles deduced from *Guy v. Corporation de Montreal* (3 L. N. 402), and with the principles on which the Court of Queen's Bench for Lower Canada appears to have decided this case, will therefore humbly advise Her Majesty that the judgment of the Court of Queen's Bench for Lower Canada, which is also the judgment of the Superior Court, should be affirmed, and that the present appeal should be dismissed with costs.

RIGHT TO CLOSE STREET. See CORPORATION (MUNICIPAL): *iusdem verbis*.

TRUSTEES FOR TURNPIKE ROADS.

THE QUEEN V. BELLEAU¹

26. Where trustees are formed into a corporation for the purposes of improving the public roads, and powers are given them by an Act of Parliament to borrow money on the credit and security of the toll gates, and not to be paid out of the revenue of the province, no liability is assumed on the part of the province either for the principal or interest of debentures issued by the said trustees, whether the public has benefited or not by the improvement of the roads.

¹ S. C. Canada, 1882 June 20th, L. R. VII Appeal Cases 473.

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INJUNCTION

BY CO-PROPRIETOR AGAINST TRUSTEE.

ISRAEL V. RODON ¹

1. A female co-proprietor having the enjoyment during her life of half of an estate, the whole of which is under the administration of trustees by a deed of settlement executed by the original sole proprietor, the husband of the female co-proprietor, cannot obtain an injunction against the trustees prohibiting them from administering her half of the estate, in the hope of realizing more than the trustees used to do.

POSSESSION OF CROWN LANDS.

GILMOUR V. MAUROIT AND ALLAIRE ²

2. The holder of a location ticket obtained from the crown for good consideration, and who has had for a long time the possession of public lands, is in the position of a *bona fide* possessor of real estate with a promise of sale, and is entitled to an injunction to restrain another person who is a lessee of crown timber limits, under a license from the Commissioner of crown lands for the Province of Quebec, from cutting timber on lots occupied by him ; and it does not matter that the location ticket might be null and illegal, as granted without authority by the Public Lands Department, until the question is settled by the courts of justice.

¹ Jamaica, 1837 Nov. 30, 11 Moore 43.

² Quebec, 1889 July 27, L. R. XIV Appeal Cases 645.

POSSESSION OF CROWN LANDS.

3. But this question of the validity of the location ticket cannot be decided under a writ of injunction, especially where all the parties that should be in the cause have not been named or been called in.

LORD MLOHOUSE, p. 649:—The plaintiff is in possession for valuable consideration given by him to the crown, in the course of dealings with the official agent of the crown, and ostensibly by the authority of that agent. Even supposing that the crown can annul the instrument which gives him title it could not treat him as a trespasser. Nor whatever may be the legal powers of the Crown, as to which their Lordships say nothing, can we consider as a mere nullity the possession of land by one who has paid money for it, and has made improvements on it, and who can hardly be expected to know of legal infirmities in the crown's titles. Their Lordships consider that this is a title sufficiently valid and a possession sufficiently lawful to carry with it the right of protection by injunction, and that the Injunction Act does not open to a defendant a door of escape merely because he may be able to show that the plaintiff's title is one which cannot be made good against all other persons.

From the statement of reasons by the learned Chief Justice, their Lordships collect that the court will not, as a general rule, decide a question of title on this kind of proceeding, especially when a third party is interested as the crown is here, but that they are in the habit of granting interim protection. It appears to their Lordships that such a practice is in accordance with the provisions of the Act, and has been properly applied in the present instance.

INSANES

CARE OF See GOVERNOR: *right of veto.*

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INSOLVENCY**ADJUDICATION IN**

ORIENTAL BANK CORPORATION V. RICHER ¹

4. A creditor cannot challenge the validity of an adjudication against his debtor, who, being a trader, has been made bankrupt on his own petition, on the ground that he has not made it appear to the satisfaction of the court that his estate was insufficient to pay his creditors at least five shillings in the pound, clear of all charges of prosecuting the bankruptcy. *Ordinance, No. 33 of 1853, sects. 40, 43, 50.*

MACLEAN V. DUMMETT ET AL ²

5. An infant cannot be adjudicated insolvent solely because he has traded, and because his name has been published

¹ Mauritius, 1884 March 29, L. R. IX Appeal Cases 413.

² Barbadoes, 1870 July 1, XXII Law Times N. S. 711.

ADJUDICATION IN

in the *Gazette* as a partner; it must be established that the infant has fraudulently asserted himself to have been of age when he was not of age, and that he has, by that fraudulent assertion, induced persons to give him credit, and thereby has contracted debts in the trade.

CESSATION OF PAYMENTS.

D'EPINAY V. COCKERELL ¹

6. Article 437 of the *Code de Commerce* says: *Tout commerçant qui cesse ses paiements, est en état de faillite*. But refusal to pay, unless followed by a cessation of payments, is not sufficient to establish the *faillite*; and a suspension of payment does not necessarily amount to cessation within the terms of the article.

7. A general stoppage of payments by the trader necessarily amounts to a refusal at the time of such stoppage; and then the *faillite* may take effect from the antecedent refusal.

8. When a firm is doing business alone and in partnership with another firm in another country, the failure of this later partnership does not include that of the first, and the subsequent failure of the former firm will only date from the time of the cessation of its own payments. *Locré, Esprit du Code de Commerce, éd. 1889, vol. 3, pp. 5, 6, 7; Journal du Palais, vol. 20, art. 5; do do, vol. 27, art. 57; Pardessus, tom. 4, par. 1107 and 1319; Cassation, 1810, April 30.*

COMPENSATION.

YOUNG V. BANK OF BENGAL ²

9. The 36th section of the Insolvent Act of Bengal enacts that when there have been mutual accounts between an insolvent and another person, compensation may be set off one against the other.

10. A firm doing business with the bank of Bengal, gave promissory notes of third parties as collateral security for a loan of money, with the understanding that upon the firm failing to meet their engagements, the bank might sell the notes, and remit the balance to the firm after re-imbursement of the sum advanced. The firm was declared insolvent, and the notes were sold for a larger amount than the loan, but the insolvents owed the bank other debts. It was held that the bank was obliged to repay to the assignee of the firm the balance of the proceeds of the notes.

¹ Mauritius, 1836 June 25, 1 Moore 103.

² Bengal, 1836 Dec. 2, 1 Moore 150.

DIFFICULTY TO ESTABLISH IT. *See Remarks of Lord Romilly, re Barron v. Stuart, the "Panama,"* v^o BOTTOMRY AND RESPONDENTIA : right of master to effect loan on.

DISTRIBUTION AU MARC LA LIVRE.

COCKERELL V. DICKENS ¹

11. The principle that a creditor cannot take a part of the common fund (*masse*) available to all the creditors *au marc la livre* for himself alone, and at the same time share with the creditors for the remainder, does not apply when that creditor has obtained by his diligence something which did not and could not form part of that fund.

EFFECT OF

CORLETT V. RADCLIFFE ²

12. The effect of insolvency is to render the insolvent incapable of disposing of his property in any manner, and all deeds passed by the insolvent in such a state, even when he would be insolvent only by the consequences of this deed, are null and void as against his creditors. The value received mentioned in the deed is not to be taken in consideration, whether it is beneficial to the creditors or not.

KERAKOOSE V. BROOKS ³

13. An undischarged bankrupt, having been employed as manager of an hotel, agreed to purchase the stock and good will from the proprietor, who knew of his bankruptcy, and who agreed to lend him a sum of money to purchase the stock and other trade effects, but on the understanding that the effects were to be assigned to him as security for the debts. Accordingly the money was lent and a bond taken for the amount, and the same day the purchase and assignment in security were perfected. The official assignee was informed that the Insolvent was carrying on business on his own account, but did not know of the above transaction.

The Judicial Committee held that the loan, purchase and mortgage were one transaction, and nothing passed to the official assignee except subject to the lien of the creditor who furnished the money.

EFFECT OF DISCHARGE UNDER THE IMPERIAL ACT.

EDWARDS V. RONALD ⁴

14. An insolvent who has obtained a certificate of discharge in England may oppose it as a bar to an action taken against him for a debt previously contracted in Calcutta.

¹ Bengal, 1840 Feb 24, III Moore 98.

² Isle of Man, 1861 Dec. 20, IV Law Times N. S. 1.

³ Madras, 1861 Dec. 6, III Law Times N. S. 712.

⁴ Calcutta, 1830 March 30, 1 Knapp 259.

EFFECT OF DISCHARGE UNDER THE IMPERIAL ACT.GILL V. BARRON¹

15. The insolvent court of the colony of *Barbadoes* ordered that appellant's property and goods should be administered under the insolvent law in force in that Island, as he had left the country being insolvent and under suspicious circumstances. The appellant afterwards settled in England and there again became a bankrupt for a debt contracted in England, but obtained a regular discharge under the bankruptcy Act, and returned with his certificate of discharge in the Island of Barbadoes. At the instance of some of his creditors, on his arrival in this last place, he was arrested and sentenced by the first court, where the original proceedings were had, to eighteen months imprisonment for fraud against the law of the Island.

The question of the jurisdiction of the court was brought before the Privy Council who maintained that the court of Barbadoes having acquired jurisdiction by the original proceedings retained it, so as to have the right, on the return of the appellant, to adjudicate upon the petition of his creditors, to punish him for his fraudulent acts, notwithstanding his certificate obtained in England.

THE LORD CHIEF BARON, p. 239:—Now, it is quite true, that an adjudication in bankruptcy, followed by a certificate of discharge in this country under the bankrupt laws passed by the Imperial Legislature, has the effect of barring any debt which the bankrupt may have contracted in any part of the world, and it would have the effect of putting an end to any claims in the Island of *Barbadoes*, or elsewhere, to which the appellant might have been liable at the date of the adjudication. There is, indeed, much to throw a deep shade of suspicion over these proceedings, but there they are, recorded according to law in this country; there is the adjudication, and there is the certificate. The adjudication has never been suspended or annulled, the certificate remains in full force; and their Lordships do not, whatever may be their opinion of the circumstances under which the adjudication was originally obtained, feel themselves at liberty to treat the proceedings as otherwise than valid, and of full force, as far as it can have any legal effect upon the debts or the proceedings in *Barbadoes*.

FRAUDULENT PREFERENCES.SMITH V. CARPENTER²

16. A debtor knowing himself to be in a state of insolvency cannot give a mortgage over all his estate to secure one of his creditors. Such a mortgage would be void as

¹ *Barbadoes*, 1868 July 1, V Moore N. S. 214.

² *Cape of Good Hope*, 1858 June 17, XII Moore 101.

FRAUDULENT PREFERENCES.

being an undue preference under the insolvency law Ordinance of the Cape of Good Hope.

17. It is immaterial whether the transaction has been voluntary or made under pressure, either small, severe or terrifying.

THE BANK OF AUSTRALASIA V. HARRIS ¹

18. The following clause is the section 8 of the *New South Wales Insolvent Act*: "All alienations, transfers, gifts, surrenders, deliveries, mortgages, or pledges of any estates, goods or effects, real or personal, warrants of attorneys, *cognovits actionem* and judgments entered thereon, made by any person being insolvent, or in contemplation of surrendering his estate as insolvent, or knowing that proceedings for obtaining an order for the sequestration of his estate, as insolvent, have been commenced, or within sixty days preceding the making of any order for sequestration of his estate as insolvent, and having the effect of preferring any then existing creditor to another, shall be and are hereby declared to be absolutely void."

The Judicial Committee held that this section provides only for fraudulent preference prejudicial to other creditors, but does not apply to preference given, under special circumstances, in good faith and without the intention of giving an undue preference.

NUNES V. CARTER ²

19. The *Jamaica Insolvent Act*, 11 Vict. c. 28, s. 67, says that if any person knowing himself to be insolvent or in contemplation of insolvency shall transfer any of his property to any creditor for his benefit, such transfer shall be deemed fraudulent and void against the official assignee; provided always, that no such transfer shall be so deemed fraudulent and void unless made within six months before a declaration of insolvency.

Held that such transfer of property so made by a party in insolvent circumstances, within a period of six months before a declaration of insolvency, was absolutely void, without it being necessary to establish any fraudulent preference.

THURBURN V. STEWARD ³

20. To constitute fraudulent preference it is not sufficient that the debtor should be, at the time of the payment, in a

¹ Queensland, 1861 June 21, XV Moore 27.

² Jamaica, 1866 Nov. 14, IV Moore N. S. 222.

³ Cape of Good Hope, 1871 Jan. 26, VII Moore N. S. 333.

FRAUDULENT PREFERENCES.

state of insolvency, it must have been made in contemplation of bankruptcy.

LORD CAIRNS, p. 389:—The *onus* of proof, of course, lies upon those who impeach the payment as having been made by way of undue preference. It is well settled by authorities in this country, which would regulate the construction put upon those words by our courts, that the mere insolvency of the person making the payment is insufficient. The mere fact that at the time of the payment the whole of his property would not be sufficient to pay the whole of his debts, is not sufficient. It is a circumstance, an ingredient in the case, to be considered with all the other circumstances of the case. The judgment, however, must be made in contemplation of bankruptcy, or, in this case, of sequestration. The words "contemplating sequestrations" are words on which, perhaps, some criticism may well be bestowed, but they have received, by the construction put upon them, the meaning that the court, judging of the fact, must be satisfied that the payment was made in the view and in the expectation of a supervening bankruptcy, and in order to disturb what would be the proper distribution of assets under that bankruptcy. Whether it was made with that intention, or not, is not only a question of fact, but, being a question of intention, the intention must be arrived at by considering the probable motives which would arise to influence the person making the payment towards making it, or towards retaining the money in his own possession.

MILLER V. BARLOW¹

21. It is not fraudulent or dishonest, but on the contrary, laudable, for a firm, though insolvent, to put an end, on the best terms possible, to a current speculation, the result of which is still uncertain, and might probably add to the losses of the firm, and this act cannot be considered as a fraudulent preference.

LORD MELLISH, p. 149:—When this agreement was entered into it was quite uncertain whether the consignment of these goods to Calcutta would turn out a profitable or an unprofitable adventure, and their Lordships are of opinion that there is nothing fraudulent or improper in an insolvent firm parting with or putting an end to a current speculation, the result of which is still uncertain, on the best terms they are able. On the contrary, such a course is an honest one to follow. If an honest man discovers he cannot pay a bet if he loses, he will be ready to rescind the bet before the event happens, and he is not bound to take the chance of winning for the benefit of his creditors. The rescission and abandonment of a speculation, whilst the result is still uncertain, is a totally different thing from preferring one creditor to others after a debt has been incurred.

¹ Calcutta, 1871 July 13, VIII Moore N. S. 127.

FRAUDULENT PREFERENCES.BENECKE ET AL V. WHITTALL ET AL.¹

22. The Bankruptcy Ordinance of Hong Kong, 1864, contains the following provisions: (s. 163) A trust deed by a debtor for the benefit of his creditors is binding upon all his creditors, if (s. 9) it transfers all the property of the debtor to a trustee, (s. 6) if the deed is signed by the majority in number and three fourths in value; the deed must be registered within 28 days; (s. 165) this section requires the registration of any deed by which a debtor, not being an insolvent, transfers his estate to a trustee for the benefit of his creditors; (s. 167) by this section, the debtor, creditors and trustee parties to such deed, shall have all the benefit of the Bankruptcy Ordinance, except sections 168 and 169.

Their Lordships held that sections 168 and 169 are supplementary to section 167, and apply only to deeds coming within the provisions of section 163.

23. Held also that a public assignee, under a deed which did not comply with the conditions of section 163, cannot, under the authority of sections 165 and 167, take an action to set aside a deed of sale of real estate as being a fraudulent preference. *Ex parte Morgan*, 1 *De G. J. & S.* 288; 7 *L. T. Rep. N. S.* 729; *Symons v. George*, 33 *L. J.* 231, *Ex.*; 10 *L. T. Rep. N. S.* 424; 13 *L. T. Rep. N. S.* 190; *Pearson v. Pearson*. *L. Rep.* 1 *Ex.* 310; 14 *L. T. Rep. N. S.* 596; *Ex parte Atkinson*, *L. Rep.* 9 *Eq.* 736.

ELLIOTT V. TURQUAND.²

24. When authority had been given to a creditor by an insolvent, both having mutual accounts, and previously to the date of the abandonment of property or act of bankruptcy of the insolvent, to receive a certain amount of money due to him, and to place it to his account, it was considered that this was a rightful payment and not a fraudulent preference, as the creditor had no knowledge of the state of insolvency of the insolvent.

IMPERIAL ACT I: THE ISLAND OF TOBAGO.COLONIAL BANK V. WARDEN.³

25. The Imperial Act, 3 Vict., ch. 41, which transfers to the trustee of an insolvent all his moveable estate and effects wherever situated, so far as attachable for debt, in

¹ Hong Kong, 1877 June 29, XXXVII Law Times N. S. 73.

² Jamaica, 1881 Nov. 10, L. R. VII Appeal Cases 79.

³ Tobago, 1846 May 13, V Moore 340.

IMPERIAL ACT IN THE ISLAND OF TOBAGO.

behalf of creditors, is applicable to all the moveable property of an insolvent firm doing business in Scotland and in the Island of Tobago, whether they are to be found in Scotland or in the colony; and the trustee may revendicate moveables seized under execution in Tobago by the Provost Marshal at the request of a creditor.

IMPERIAL ACT IN NEW ZEALAND.BUNNY V. HART ¹

26. The English Bankruptcy Act of 1849 does not apply to New Zealand.

LEGISLATION ON See LEGISLATURE: *legislative powers: iisdem verbis.*

PARTNERSHIP ESTATE.HOARE V. THE ORIENTAL BANK CORPORATION ²

27. By the Insolvent Law of England, 1841, in force in New South Wales, a debt due jointly and severally by a firm and other persons individually to a third party may be wholly proved and admitted against the joint estate of the partnership *pari passu* with the partnership creditors. *Ex parte Honey*, L. R. 7. ch. 178; *Ex parte Bond and Hill, Atkins*, p. 98; *Ex parte Field*, 3 M. D. & De G. 95; *Ex parte Buckingham*, 1 M. D. & De G. 585; *Ex parte Crosfield*, 1 Deac. 415.

POWERS OF THE ASSIGNEE.MELBOURNE BANKING CORPORATION V. BROUGHAM ³

28. It has been a recognized practice for assignees, when a foreclosure suit has been brought or threatened by a mortgagee, and the equity of redemption was valueless, to disclaim any interest.

29. This practice is clearly authorized by the *Insolvency Statute of Victoria*, 1865, sect. 27.

30. A verbal agreement between the agent of a bank and an assignee to the effect that this latter should execute to the bank a release of the equity of redemption, and that, in consideration thereof, the bank should not prove any debt upon the estate, is valid and binds the bank, though not made under seal, if the bank accepts the release and acts upon it.

¹ New Zealand, 1857 June 16, XI Moore 189.

² New South Wales, 1877 May 9, L. R. II Appeal Cases 589.

³ Victoria, 1879 Jan. 25, L. R. IV Appeal Cases 156.

PRIVILEGED CLAIM AGAINST JOINT ESTATE.

ROLFE AND BAILEY AND THE BANK OF AUSTRALASIA
V. FLOWER SALTING & Co.¹

31. The 39th section of the Insolvent Act of the colony of *Victoria*, enacts: "That any creditor who shall have or hold any security or lien upon any part of the insolvent estate, shall, when he is the petitioning creditor, be obliged upon oath, in the affidavit accompanying the petition, and when he is not the petitioning creditor, in the affidavit produced by him at the time of proving his debt, to put a value upon such security, so far as his debt may be thereby covered, and to deduct such value from the debt proved by him, and to give his vote in all matters respecting the insolvent estate as creditor only for the balance, etc. And in case any creditor shall hold any security or lien for payment of his debt, etc., upon any part of the said estate, the amount or value of such security or lien shall be deducted from his debt, and he shall only be ranked for, or receive payment of, or a dividend for the balance after such deduction."

In construing this enactment, the Judicial Committee held, that it does not destroy the distinction between the joint and separate estate of an insolvent, so as to compel a creditor holding a mortgage security on the separate estate, to estimate and deduct its value before he can be allowed to prove against the joint estate.

32. The English law of bankruptcy allows a joint creditor, though holding a security on the separate estate, to prove against the joint estate without giving up his security.

LORD CHELMSFORD, p. 391:—The question to be determined is, whether *Flower Salting & Co.*, being creditors of an insolvent partnership, before they could be allowed to prove against the joint estate of the insolvents, were bound to value a security which they held upon the separate estate of one of the partners. If the question had arisen in this country, there would have been no difficulty in answering it. It was asserted, indeed, in argument, that the rule, that the security to be deducted must be upon the same estate as that against which the proof is directed, was not laid down as a general rule by Lord Eldon in *Ex parte Peacock* (2 Gl. and Jan. 27). This, however, was not the opinion of Lord Lyndhurst, who in the case *In re Plummer* (1 Ph. 60), said: "In administration under bankruptcy, the joint and separate estate are considered as distinct estates: and accordingly it has been held: that a joint creditor having a security upon the separate estate is entitled to prove against the joint estate without giving up his security; on the ground that it is a different estate. That was the principle upon which *Ex parte Peacock* pro-

¹ Victoria, 1866 Feb. 1, III Moore N. S. 365.

PRIVILEGED CLAIM AGAINST JOINT ESTATE.

ceeded, and that case was decided first by Sir *J. Leach*, and afterwards by Lord *Eldon*, and has since been followed in *Ex parte Bowden*¹ (1 Dea. and Ch. 135).

Whatever may have been the origin of the rule, it must now be considered to be the established law in this country.

It was said by Mr. *Hobhouse*, for the appellants, that the rule was laid down without any consideration of its justice or expediency, and that it was most unjust that a creditor should secure himself *aliunde* and yet come in *pari passu* with the other creditors. That the colony of *Victoria*, in introducing the new Code of Insolvent Law, which is applicable to the present question, had been careful to prevent such injustice in the distribution of an insolvent's estate. And he contended, that this was effectually done by the provisions of the Colonial Act, 5th Vict., No. 17, and especially by the 39th section.....

But if this were the establishment of a new Code of Insolvent Law, and it was the object of the Colonial Legislature to prevent the operation of a rule which they considered unjust, it is hardly to be imagined that they would have committed their intention to the equivocal meaning of a few words in the single section of the act. It is just as reasonable to suppose that, knowing the rule established in this country, which is founded not upon any statute, but upon general principles applicable to many other cases, they did not intend to disturb it. The alleged injustice of the rule has been endeavoured to be shown by viewing it on one side only. While the joint creditors are alone regarded, it may be successfully agreed to be a hardship upon them that a creditor secured on a separate estate should resort to the joint estate, and so reduce their dividend; but, on the other hand, it may be contended, on the part of the separate creditors, that it would be a great injustice to them to compel the joint creditor, with a separate security, to have recourse, first to the separate estate, which he might exhaust, and thus leave the separate creditors without a fund for the payment of their debts. These conflicting views seem to put the argument of His Lordship aside, so as to allow the operation of the well established principle, that, upon a joint bankruptcy or insolvency, the joint estate is the fund primarily liable, and that the separate estate is only brought in in case of a surplus remaining after the separate creditors have been satisfied out of it.

TRANSFER OF SHARES.

LEVI V. AYERS¹

33. By the South Australian Insolvent Act of 1860, a transferee of shares of a banking corporation who takes the beneficial ownership, is bound to indemnify the transferor against the liabilities in respect of them subsequent to the date of the transfer.

34. An assignee to an insolvent who holds such shares is not subjected to this provision, as the law makes a distinc-

¹ South Australia, 1878 May 28, L. R. III Appeal Cases 842.

TRANSFER OF SHARES.

tion between persons taking an assignment of shares or the beneficial interest therein by way of contract and under an ordinary deed, and the assignee of a bankrupt or insolvent who takes his whole estate by operation of law. *Wilkins v. Fry*, 1 *Mer.* 244.

SIR BARNES PEACOCK, p. 855:—It seems to be quite contrary to the principle of the laws relating to bankrupts or insolvents, that the assignees, taking the property for division amongst his creditors, should be liable, either personally or out of the assets of the estate, to indemnify the bankrupt or insolvent in respect of any claims to which he may have rendered himself liable in respect of a particular portion of the estate, and from which claims he has not been discharged by his bankruptcy or insolvency.

INSURANCE**ABANDONMENT.**

PROVINCIAL INSURANCE COMPANY OF CANADA *v.* LEDUC ¹

35. Where notice of the abandonment of a ship is given by the insured to the insurers, the silence of the insurers will not amount to an acceptance of the abandonment.

36. But if without any notice to the insured, the insurers take possession of the ship, and repair it and retain it in their possession for some time without repudiating the abandonment, there is a constructive acceptance of the abandonment by the insurers, which has the same effect as an express acceptance; and the insurance company must be held liable as for a total loss.

37. Held also, that the constructive acceptance of the abandonment is an agreement which is a waiver of a plea of breach of warranty.

SIR BARNES PEACOCK, p. 237:—The case of *Hudson v. Harrison* ² was cited as an authority to shew that the silence of an insurer has been construed to be an acceptance of an abandonment. It is not necessary to go to that length in this case. Their Lordships consider that Mr. Justice Story was correct in stating that an insurer is not bound to signify his acceptance of an abandonment. If he says nothing and does nothing, the proper conclusion is that he does not mean to accept. In the case of *Peele v. The Merchants' Insurance Company* ³ it was held by Mr. Justice Story that the floating and repairing of a stranded ship by the underwriters, though it was done with the intention of surrendering to the assured, was a constructive acceptance of an abandonment. In the case of *Peele v. The Suffolk Insurance Company* ⁴ the Supreme Court of Massachusetts held

¹ Quebec, 1874 June 26, L. R. VI P. C. 224.

² 3 B. & B. 97.

³ 3 Mason's Reports, 27; Phillips on Insurance, vol. ii, 5th Ed., p. 375.

⁴ 7 Pickering's (Mass.) Reports, 254; Phillips on Insurance, vol. ii, 5th Ed., p. 375.

ABANDONMENT.

that, though the underwriters had a right to keep possession of a ship for a reasonable time to repair it, yet that their keeping of it for an unreasonable time for that purpose was a constructive acceptance of the abandonment. It has also been held that, if the underwriters take possession of a vessel after an abandonment, and proceed to repairs without giving notice of their object, it is an acceptance.¹

In the present case the defendants were not merely silent, but they were active, and by their agent, Mr. McGregor, took possession of the vessel after notice of abandonment had been sent to the head office at Toronto; and the vessel was kept in the possession of the defendants from the time it was raised and taken into Gaspé until it was arrested at the instance of the defendants by the Vice-Admiralty Court, and it must have been repaired before it was taken to Montreal.

Mr. McGregor stated, in his evidence, that he left the vessel at Gaspé when he returned to Toronto; but there can be no doubt that it was left in the charge of some person on behalf of the company from that time until the month of September following, when he returned to Gaspé and took the vessel up to Montreal; and at all events, the vessel having been raised and taken into Gaspé by the agent of the defendants, must be assumed to have remained in their possession until proved to have been delivered over. There is no evidence that the plaintiff, at any time during that period, had notice of the object with which the defendants took and retained possession of the vessel, or that they disputed their liability for the loss upon the ground of a breach of warranty, or that they repudiated the notice of abandonment. There was nothing to lead the plaintiff to suppose that the defendants repudiated altogether their liability under the policy and the notice of abandonment, and that they were acting, not as insurers, but as mere ordinary salvors, who had no interest whatever in the vessel, and their Lordships cannot believe that they acted merely in that capacity. The remarks of the Court in the case above cited of *The Cincinnati Insurance Company v. Bakewell* are very applicable to the present as regards that suggestion.

Mr. Justice Badgley considered that the decree of the Vice-Admiralty Court in favour of the defendants proved them to be mere salvors of the vessel. But their Lordships do not concur in that view. That decree is dated the 23rd of April, 1869. It does not appear, nor is it very material, at what time the suit in the Vice-Admiralty Court was commenced. It is, however, stated by Mr. Justice Badgley, and the fact is probably so, that the vessel was libelled pending the present action, in the Superior Court. It was, however a proceeding in rem, and not against the plaintiff personally. It would have been no answer in that proceeding for the plaintiff to have alleged that he had no interest in the vessel, that by virtue of the insurance, the loss, the abandonment, and the acceptance thereof, the vessel had become the property of the defendants. If the defendants thought fit to libel their own vessel for

¹ *The Cincinnati Insurance Company v. Bakewell*, 4 B. Munroe's Reports (Kentucky), 541.

ABANDONMENT.

salvage, it was no concern of the plaintiff's nor was he bound to appear. He could not have defended that suit without alleging that he had an interest in the vessel, and thereby prejudicing his own action on the policy and his contention that the defendants had accepted the abandonment.

Mr. Crocker stated that McGregor was never instructed to accept an abandonment, and that abandonment could be accepted only at the head office and by writing; but McGregor was instructed to look after the interests of the company, and if his acts in pursuance of those instructions, coupled with the non-repudiation of the notice of abandonment, amounted to an acceptance, or were evidence from which an acceptance might be inferred, the defendants are bound by those acts. The question as to whether the abandonment has been constructively accepted is a mixed question of law and fact. Unfortunately we have not the reasons of the majority of the Judges. Their Lordships are of opinion that the acts of the defendants, by their agent, McGregor, in regard to the vessel after notice of abandonment, and especially their repairing the vessel and retaining it in their possession from the time when it was raised up to the time of their libelling it in the Vice-Admiralty Court, without repudiating that notice or informing the plaintiff as to the character in which they were acting, were evidence of an acceptance of the abandonment. They would not reverse the concurrent decisions of two Courts upon a question of fact except upon the clearest conviction that they were wrong. In the present case they are of opinion that the Courts were correct in finding that the abandonment was accepted. Their Lordships' view upon this part of the case would be the same even if Mr. McCuaig had not forwarded the notice of abandonment to the head office before the 18th of June.

Then, as to the effect of that acceptance, it was contended that, as there was no loss for which the defendants were liable, the notice of abandonment was inoperative, and that the acceptance of it could not convert a partial loss for which the defendants were not liable into a total loss for which they were liable. Articles 2521 and 2522 of the Civil Code were referred to, and it was urged that there could be no loss within the meaning of the Code unless it was caused by an event insured against. Mr. Justice Badgley was of that opinion, and he considered that at most there was only a partial loss, which could not, under Articles 2544 and 2545, be converted into a total loss by notice of abandonment. That learned Judge said, "implications of acceptance are not favored and can have no effect or validity in contravention of the positive fact upheld by Article 2545 of the actual recovery of the stranded vessel." He was also of opinion that the fact of the restoration and recovery of the stranded vessel prevented abandonment at all.

It appears to their Lordships that the learned Judge did not sufficiently advert to the distinction between a mere notice of abandonment and a valid abandonment, or a notice of abandonment which has been accepted.

Their Lordships are of opinion that the present case did not fall within Article 2545, upon which Mr. Justice Badgley, so much relied.

ABANDONMENT.

It was not a case of mere stranding. The vessel could not have been raised and put into a condition to continue her voyage to the place of destination. Further, it appears to their Lordships that Article 2545 must be read in conjunction with Articles 2538, 2543 and 2544, and that it does not apply to the case of an abandonment which has been accepted. It puts the case of stranding very much upon the same footing as that upon which it stands under the law of this country. Abandonments made and accepted are treated of in Article 2547. It is there said: "Abandonment made and accepted is equivalent to transfer, and the thing abandoned, with the rights pertaining to it, becomes from the time of abandonment the property of the insurer. The acceptance may be either express or implied."

Article 2549 of the Code was intended to prevent a notice of abandonment when accepted from being defeated by any subsequent event.

The Superior Court held that the defendants were estopped, by the acceptance, from urging against the plaintiff objections founded upon the breaches of condition, and awarded the plaintiff half the amount, viz., \$3500, of the declared value of the vessel. The Court of Queen's Bench (Mr. Justice Badgley dissenting) held that the allegations set forth by the plaintiff in his declaration, which included an allegation of acceptance, were fully proved, and that by reason thereof, and of the abandonment accepted by the company, the plaintiff was entitled to recover the full amount insured, viz., \$5000. Mr. Justice Monk dissented on the question of amount only. He considered that the plaintiff was entitled to recover but only one-half of the amount insured.

Their Lordships are of opinion that by the acceptance of the abandonment, the defendants became liable as for a total loss. In *Smith v. Robertson*¹ it was held that the insurers could not be allowed to say that the loss was not total after they had acquiesced in the abandonment as for a total loss, and had thereby admitted that the loss was a loss of that description. In that case the insurer had no right to abandon, but merely a right to give notice of abandonment. But the moment the notice was accepted, the abandonment took effect; the loss immediately became tantamount to a total loss; and the insurers were precluded from relying upon the subsequent recovery of the property because they were not allowed to say that the loss was not total. This case, as it appears to their Lordships, gets rid of the objection of Mr. Justice Badgley to the form of the plaintiff's declaration. He says:—

Now the only loss alleged in the declaration is that "*le dit navire aurait péri corps et biens dans le Golfe Saint-Laurent, faisant un naufrage entier et complet*," which is the absolute total loss of the Code article, where the thing insured is wholly destroyed and lost, in other words, submerged in the Gulf of St. Lawrence. As matter of fact, the alleged total loss is not true, and has been disproved, but it is the only one alleged, and the insurers cannot be made to suffer from any other description of loss or cause of action than that

¹ 2 Dow. 474.

ABANDONMENT.

charged; and in strict justice the appellant's action should be dismissed, unless, under the rule of practice, he should elect to amend his declaration to meet the proof of the case, which as it admits of no effective abandonment with its alleged acceptance as set out in the declaration."

Their Lordships would deeply regret if an objection to the mere form of the declaration, which does not affect the merits of the case, should compel them to decide against the plaintiff, but they are relieved from that difficulty by the above-mentioned case in the House of Lords, in which it was held that the insurers after acceptance could not be allowed to say that the loss was not total.

It was contended that the vessel was not insured at the time when she was lost, as the insurance did not extend to a loss in the Gulf of St. Lawrence after the 15th of November, and that an abandonment can be of no avail when there is no insurance. But the vessel was in fact insured; the loss occurred during the time and upon a voyage described in the policy, but there was a breach of one of the warranties or conditions expressed. In the case of the *Cincinnati Insurance Company v. Bakewell*¹, the insurance was merely against a total loss. But it was held that the insurers could not, after acceptance of an abandonment, rely upon the fact that the loss was not total, and consequently, that it was a loss within the terms of the policy.

There is no distinction in principle between an express and a constructive acceptance of an abandonment. The effect produced upon the rights of the parties is the same in both cases. Suppose the defendants, upon the receipt of the notice, had written to the plaintiff, and said that, as the loss took place in the Gulf of St. Lawrence after the 15th of November, they did not consider themselves in strictness liable to make good the loss; that they found upon inquiry that Mr. Routh, their agent at Montreal, through whom the insurance was effected, was under the impression that that part of the warranty which declared that the vessel was not to be in the Gulf of St. Lawrence after the 15th of November applied merely to the case of its going west, and that, under those circumstances, they did not consider it right to avail themselves of the breach of warranty; that they accepted the abandonment and would make the best they could for themselves of the salvage, and would settle as for a total loss. Or suppose they had gone further and stated that they concurred with Mr. Routh in his construction of the policy, and that they accepted the abandonment. Suppose that, after they had raised the vessel they had sold her for \$10,000 in excess of the salvage expenses, it is clear that the plaintiff could not have turned round and claimed the full amount of the proceeds of the vessel upon the ground that the loss was not caused by a risk insured against, and that he had, consequently, no right to give notice of the abandonment. If the plaintiff could not have treated the abandonment as a nullity, surely the defendants cannot be allowed, after acceptance, to rely upon a breach of the warranty or condition of which they

¹ 4 B. Muirroe's Reports (Kentucky), 541.

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had full notice at the time of their acceptance of the abandonment. Estoppels are mutual. If the mouth of one party is closed, so also is that of the other. By the abandonment and the acceptance of the abandonment, the matter was closed. The whole interest of the plaintiff in the thing abandoned was transferred to the defendants, and became their property (Article 2547).

There are many cases in which it may be very doubtful whether in point of law, the particular fact amounts to a breach of warranty. But if, after a constructive total loss and notice of abandonment, the insurer, with full knowledge of all the facts, accepts the notice of abandonment, he cannot, when called upon to pay the amount insured, resile and rely upon a breach of warranty.

The effect of acceptance is, as remarked by Mr. Arnould, well expressed by Boulay Paty¹ — "*Par leur acceptation volontaire il s'est fait un pacte entre les parties qui a tout terminé*".²

The only remaining question is as to the amount to which the plaintiff is entitled. Jean Baptiste Vigneau proved that his brother, Benjamin Vigneau, who was the captain of the vessel and was lost in her, told him that he was in debt to the plaintiff, that he had given him a guarantee for the debt, and had authorized him to insure the vessel *Babineau and Gaudry* in his own name, to the end that if the vessel should be lost the plaintiff might receive the whole of the insurance money, and pay himself the amount which Benjamin Vigneau owed him.

Their Lordships consider that this declaration of the deceased against his own interest was evidence sufficient to prove that the plaintiff was authorized by Benjamin Vigneau to insure the half of the vessel which belonged to him, and to receive the amount insured. This, coupled with the interest which the plaintiff had in the other half of the vessel, entitled him to insure the whole vessel, and to recover the full amount insured.

Mr. Justice Badgley appears to have overlooked the evidence of Jean-Baptiste Vigneau, when he stated that his interest in the insurance money did not exceed one-half share thereof. It is clear that an agent who insures for another with his authority may sue in his own name. The mortgage did not affect the plaintiff's right to insure for the full amount of the value of the vessel. The vessel, or the value of it, may be the only means which he has of paying the mortgage debt.

Their Lordships are of opinion that the Judgment of the Court of Queen's Bench was correct, and they will humbly advise Her Majesty to affirm it, with the costs of this appeal.

CONDITIONS IN POLICIES.

McEWAN V. GUTHRIDGE³

38. The condition contained in a policy of fire insurance, that the policy was to be void, if at any time there was

¹ Cours de Droit Comm., tit. xi, sec. 7, vol. iv, p. 380.

² Arnould, Marine Insurance, 4th ed., p. 859, note.

³ Victoria, 1860 Feb. 2, XIII Moore 304.

CONDITIONS IN POLICIES.

more than 56 lbs. weight of gunpowder on the insured premises, unless specially provided for in the policy, was held not unreasonable, and that condition not having been observed, the policy was declared void. The fact that the insured premises were used for general trade, and the assured sold, to the knowledge of the insurer, among other things, gunpowder and had given a specification of the stock in trade in the policy including hazardous risks, did not discharge the condition, as the assured should have made special provisions against the condition.

THE BEACON LIFE AND FIRE ASSURANCE CO. V. GIBB¹

39. A contract of insurance against fire was effected on a ship. In making the contract a form of policy generally used for houses was taken, in which there was a condition to the effect that if more than twenty pounds weight of gunpowder should be "on the premises" at the time when any loss happened, the policy would be void. The Judicial Committee held that the condition in question was applicable to the case of a steamer insured. The word "premises," though in popular language applied to buildings, yet in legal language means the subject or thing previously expressed; and the question being, not what was the intention of the parties, but what is the meaning of the words they have used, it was held to be a reasonable construction of the contract and that the vessel should not carry more than 20 lbs. weight of gunpowder. *For the remarks of their Lordships, see CONTRACT: construction, same case.*

THE PROVINCIAL INSURANCE COMPANY. V. LEDUC²

40. When a condition in a policy has not been observed, if, however, the insurers accept the abandonment of the ship made by the insured, they cannot afterwards take advantage of the nullity of the policy in consequence of the violation of the condition. This acceptance of the abandonment, whether express or constructive, is a waiver of the right to raise the question of nullity. *For the remarks of their Lordships, See INSURANCE: abandonment.*

WHITE V. THE WESTERN ASSURANCE COMPANY³

41. Where a policy of fire insurance has been transferred in trust, and one of the conditions of the policy requires

¹ Lower Canada, 1862 Dec. 3, 1 Moore N. S. 73.

² Quebec, 1874 June 26, L. R. XI P. C. 234.

³ Quebec, 1875 March 9, 7 R. L. 106.

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that the assignor shall make and furnish the necessary proofs in support of the claim for loss before the same shall be recognized and payable, the furnishing of such proofs by the assignor and not by the assignee is a condition precedent to the right by the assignee to recover the amount of the loss.

42. In a policy containing the condition that no loss shall be paid unless the proofs of the loss be made within a specified time, the delay is a material part of the condition, and, therefore, the assured cannot claim any indemnity if he has not sent in proper proofs within the delay.

43. The mere silence of the company with regard to proofs sent in after the delay mentioned in the condition, does not amount to a waiver of the condition in behalf of the company.

PER CURIAM :—Their Lordships are clearly of opinion that the 30 days are a material part of the condition; so that unless there is a waiver, the assured cannot recover unless he sends in the proper proofs within 30 days. It was said, that although it was a condition precedent that the proofs should be sent in, yet the period of 30 days was not material; but if that were so, then there would be no time appointed at all within which the proofs were to be sent in, and the assured might wait one, two, or three, or four years before he sent in his proof, and still be entitled to recover, which would appear to be entirely contrary to the true meaning of the condition. And indeed the cases which have been referred to which have been decided in England,—the case of *Meeson v. Hardy*, and another case in *1 Ellis and Ellis*,—are decisions by the Courts here that the time mentioned is an essential part of a condition of this kind, and that is affirmed by the clause which has been cited from the Code of Canada, by which, if, by some impossibility, the assured is prevented from sending in his proofs within the proper time, further time may be given to him. Therefore their Lordships think that it was essential that the proofs should be sent in within 30 days, unless that was waived.

That being so, their Lordships are also of opinion that the not answering a letter sending in proofs after the 30 days—the mere fact of not answering that letter—cannot possibly be a waiver of the not sending the proper proofs in, and not sending them in within proper time. Whether, if the proofs, or what appear to be and professed to be proofs, had been sent in within the 30 days, asking, as this letter does, whether those proofs were satisfactory,—whether in that case the not answering it, when if they had answered it possibly the assured might have sent in proper proofs in time, would be a waiver, it is not necessary to consider; but it appears to their Lordships that after the 30 days are over, and when the assured had a defence to the action, their not answering a letter cannot be sufficient to amount to a waiver. Their Lordships do not mean to say

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that there may not be a waiver after the 30 days are over. It is possible that if they did anything which misled the assured, or put him to expense, there might be a waiver after the time was over; but they are clearly of opinion that not answering this letter sent after the 30 days cannot of itself be sufficient.

Then with respect to the letter of the 31st August, that was in answer to a letter of the 24th of August, in which Mr. Whyte says not only the 30 days have elapsed, but "would you allow me to remind you that 60 days have elapsed since proof was furnished." Therefore that was when more than 90 days had elapsed, and when the assured was alleging that he had performed all the conditions, and was entitled to recover, and when the time had long gone by. Then in answer to that the assurers say:—"We have to inform you that the Company consider that they are not liable for any loss referred to in the claim you have made under said policy, and decline paying it." If that letter also had been sent within the 30 days before the time had elapsed, or had been sent after the 30 days had been waived, and had been sent at a time when it was still possible for the assured to have sent in proper proofs, then it might well be said that the Company, by saying they are not liable for the loss, are not relying on the non-compliance with the sending in the proper proofs, but are relying on some defence on the merits respecting the fire itself. But when the time for the sending in the proofs has elapsed, merely writing to say they are not liable for the loss cannot in their Lordships' opinion amount to any waiver, because it is perfectly consistent with that that the Company are going to say that they are not liable for the loss referred to because the proper time for sending in the proofs has elapsed and the proofs have not been sent in.

Therefore their Lordships are of opinion that the direction of the judge was perfectly right on that part of the case, and that the verdict of the jury was right, and that the decision of the Court was correct; and therefore they will humbly advise Her Majesty that the appeal be dismissed with costs.

See **DAMAGE**: *dangers of the sea*.

CONSTRUCTION OF CONTRACT.

GRANT V. THE ÆTNA INSURANCE COMPANY¹

44. An assurance policy was taken in July 1858 against fire for twelve months, on a steamship, which was described in the policy as "now lying in Tate's Dock, Montreal, and intended to navigate the St. Lawrence and lakes from Hamilton to Quebec principally as a freight boat, and to be laid up for the winter in a place approved by the company." The ship never left the dock after the insurance was effected and was destroyed by fire in June 1859. The Judicial Committee held that as there was evidence of a reasonable

¹ Lower Canada, 1862 July 1, XV Moore 516.

CONSTRUCTION OF CONTRACT.

and *bonâ fide* intention on the part of the insured to comply with the conditions of the policy, and as there was no warranty in the contract that the ship would navigate, but only a declaration of her intention to navigate, the policy was not void by the fact that the steamer never left the dock.

LORD KINGSDOWN, p. 527 :—It was contended before us, in a very able argument, that the words referred to contained no warranty ; but that if they did the warranty extended only to this—that an intention to employ the ship in the manner described was *bonâ fide* entertained by the insured when the policy was effected.

It was argued that this would be the meaning of the words if they were merely representations, according to several authorities cited ; and it was argued that though the effect of a warranty was very different from that of a representation, the meaning of the words used must be the same, whether they were found in or out of the policy.

Their Lordships are of opinion that the question depends entirely on the meaning to be attached to these words. If they import an agreement that the ship shall navigate in the manner described in the policy—then being an engagement contained in the policy—they must be considered as a warranty, and the engagement not having been performed, whether the engagement was material or not material, the insurers are discharged.

But their Lordships think that this is not the true meaning of the words used. They consider the clause in question amounts only to this : The assured says, my ship is now lying in Tate's Dock ; I mean to remove her for the purpose of navigation in the manner described, and if I do the policy shall still be in force ; but in that case I engage to lay her up in winter in a place to be approved by the Company.

This construction, which implies no contract to navigate, seems to their Lordships the natural meaning of the words used, and imputes a reasonable intention to the parties to the policy.

Their Lordships, must, therefore, advise Her Majesty to reverse the judgments complained of, and to direct that the defendant's motion be dismissed, and that the appellant's costs of the motion in the Superior Court, and of the appeal to the Queen's Bench, and of the appeal to Her Majesty in Council, be paid to him by the respondents.

ANDERSON ET AL V. THE PACIFIC FIRE AND MARINE INS. CO. ¹

45. The respondents were the insurers of a ship for £4,000, and had taken a re-insurance with the appellants for £500. In the proposal of re-insurance it was stated that the ship was "insured only for £4,000." Held, that these words must be construed so as to mean the original insurance with the respondents, and not the total assurance in all companies whatever.

¹ Victoria, 1867 July 7, XXI Law Times N. S. 408.

CONSTRUCTION OF CONTRACT.

COLONIAL INSURANCE COMPANY OF NEW ZEALAND v. ADELAIDE
MARINE INSURANCE COMPANY¹

46. Where the insured propose in writting to insure a wheat cargo "at and from" port, and the insurers answer that they accept the risk "in accordance with your written request," "from" port, there is a complete contract to insure at and from port.

47. And where the contract of insurance related to a wheat cargo then on board or to be shipped, the risk commenced as soon as any portion thereof was on hand. See CONTRACT : *eodem verbo*. *The Beacon Life and Fire Assurance Company v. Gibb*.

48. The charterers of a vessel were also the purchasers of the cargo consisting of wheat to be shipped on board; the vendors delivered the wheat gradually from time to time. Held by the Judicial Committee that such delivery vested in them a right of property and possession, and consequently, gave them an insurable interest in such portion as had been so delivered, even admitting that the purchasers had the right to return the wheat which had been delivered, in the event of the sellers neglecting, without lawful excuse, to complete the supply, because they also had the right to keep the portion received by paying for it, if they so chose.

SIR BARNES PEACOCK, p. 138 :—In many cases of contracts to supply a quantity of goods to be delivered within a fixed period, the whole quantity cannot, from the very nature of the case, be delivered at one time, and it must be frequently happen, as in contracts for supplies of provisions for the army or navy, or supplies to establishments, that the quantities first delivered are appropriated and actually consumed by the persons to whom they are delivered before the expiration of the period within which the whole contract is to be performed. As no time was fixed by the contract for the payment of the purchase money the purchasers might not have been bound, if no loss had occurred, to pay for the wheat on board from time to time until the whole cargo had been supplied; but it does not follow that they had not an insurable interest before the price was paid or payable. It appears from what follows that a man may have an insurable interest in goods for which he has neither paid nor become liable to pay.

In the present case, if no loss had happened, and the sellers, without lawful excuse, had neglected to supply a complete cargo, the purchasers must have paid for the wheat which had been put on board, unless they returned it. If the sellers had completed the cargo the purchasers must have paid for the whole. In either case they had, at the time of the loss, an interest in the part which had been

¹ Australia, 1886 Dec. 18, L. R. XII Appeal Cases 128.

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put on board. In the one case, that they might be able to return it to excuse them from payment for it in the event of their electing to put an end to the contract in case of the non-completion of the supply; in the other, that they might have the goods for which they would be obliged to pay. *Anderson v. Marcil L. R. 10 C. P. 58; Oxendale v. Wetherel, 9 B. & C. p. 387; Van Castell v. Booker, 2 Ex. 699; Dunlop v. Lambert, 6 Cl. & F. 620.*

INSURABLE INTEREST. See SALE: *what constitute the sale. The South Australian Insurance Company v. Randell.*

OPEN COVER.

BRUGMANDASS V. NETHERLANDS INDIA SEA AND
FIRE INSURANCE COMPANY OF BATAVIA ¹

49. The respondent offered to insure under open cover the goods of the appellants before they were shipped for a voyage from Rangoon to Bombay. After the shipment of the goods, application was made for the policy, but it was refused. Held in an action for specific performance of a contract of insurance that the company was bound, the application for the policy being a sufficient acceptance of the proposal.

POWERS OF AGENT.

THE MONTREAL ASSURANCE COMPANY V. MCGILLIVRAY ²

50. The agent of an insurance company has no power to insure a house against fire and to give delay for the payment of the premium. Where a promissory note was given for the premium of a fire policy, and the building was destroyed by fire after the note had become due and dishonored, the insured could not recover, the Judicial Committee holding, that the powers of the agent, being public, must be taken to have been known to the insured, and that the acts of the agent in the transaction were *ultra vires* and void, not being within the scope of his general authority as agent, and, therefore, not binding upon the assurance company.

THE RIGHT HON. SIR JOHN COLERIDGE, p. 120:—And upon this they think, the true question for the jury to have been, not what was the real extent of authority expressly or in fact given by the appellants to *Murray*, but what the appellants held him out to the world, to persons with whom they had dealings and who had no notice of any limitation of his powers, as authorized to do for them. For it cannot be doubted, that an agent may bind his principal by acts done within the scope of his general and ostensible authority, although those acts may exceed his actual authority as between

¹ Rangoon, 1888 Dec. 1, L. R. XIV Appeal Cases 83.

² Lower Canada, 1859 June '2, XIII Moore 87.

POWERS OF AGENT.

himself and his principal; the private instructions which limit that authority, and the circumstance that his acts are in excess of it, being unknown to the person with whom he is dealing.

Page 124:—Now, *Murray* was, indeed, their general agent; and had he merely made an unwise contract for them, or had he been satisfied with answers which ought to have been deemed unsatisfactory; in these and many more supposable cases (collusion on the part of the person seeking to be insured being out of the question), the company would have been clearly bound; in all such supposed cases he would have been acting within the scope of the authority which the company held him out as possessing. But if he was, and was known to be, an agent only for effecting insurances by policy on payment of a premium (and their Lordships see no evidence beyond this), then he was not their agent in the act which he really did, and they are not bound by it.

RENEWAL.

KIRKPATRICK V. SOUTH AUSTRALIAN INSURANCE CO. ¹

51. When the terms of the renewal of certain lapsed insurance policies against fire had been ascertained by an insurance agent for his benefit, and this agent had remitted to the office of the company £100 in excess of the premiums owed by him, it was held that, although there had been no appropriation of the money by the company to the renewal of those policies, yet that the renewal had taken place and the £100 should be applied to the payment of the premiums for such renewal.

STAMP ON POLICY. See LEGISLATURE : *legislative powers.*

SUBROGATION.

THE QUEBEC FIRE ASSURANCE CO. V. ST. LOUIS ET AL ²

52. An assurance company, in paying the amount or part of the amount of the loss is entitled to a subrogation at the time of the payment from the insured of all the rights of the latter with respect to the loss he has sustained.

53. In the case of a general average, the assurer, after having indemnified the assured against the losses sustained for the common benefit, ought to be subrogated in the rights of the assured to the contribution, which in such case must be made *Pothier, On Assurance p. 248.*

54. Held also, that the company may sue alone for damages as subrogated to the insured for so much as they were bound to pay and had paid under the policy.

¹ South Australia, 1886 Feb. 24, L. R. XI Appeal Cases 177.

² Lower Canada, 1851, Feb. 6, VII Moore 316.

TERMINATION OF CONTRACT.**SUN FIRE OFFICE V. HART ¹**

55. A policy of insurance against fire was issued subject to the conditions: *first*, that it should not apply to any portion of the subject of insurance which should, by reason of some act done after its date without the consent of the insurers, be exposed to increased risk of fire, or removed to a building or a place other than that described in the policy; *second*, that the insurers might terminate it by notice if "by reason of such change, or for any other cause whatever," they should desire to do so, refunding to the insured a rateable proportion of the premium for the unexpired time of the policy.

The Committee held that the insurers had, by this condition, the option of terminating the policy at will, for any and every cause which could reasonably induce an insurer to desire the termination of the policy for the advantage of its business.

TOTAL LOSS.**CURRIE V. THE BOMBAY NATIVE INSURANCE CO. ²**

56. This was a suit brought to recover the amount of two policies of insurance upon the cargo and freight of a ship respectively; both policies being for a total loss. The ship having become a wreck, the captain, without taking any steps to save or discharge the cargo, deeming this impracticable, proceeded to dismantle the ship, and gave notice to the insurers of abandonment of the cargo, and sold both ship and cargo by public auction. A large part of the cargo was afterwards saved.

The court below held, that as the cargo might have been and was, in fact, partially saved, there was no such total loss of the cargo and freight as entitled the assured to recover on either of the policies. This ruling, as regards the cargo, was affirmed, but as the ship when she was reduced to a wreck, was incapable of earning any freight, the Judicial Committee were of opinion that there was such a total loss of the disbursements, to be paid out of the freight, as to entitle the assurers to recover on that policy.

CARRMAN V. WEST ³

57. Where a ship had been deserted by her master and crew, who previously placed her in a sinking condition, and afterwards had been subsequently taken possession of

¹ Windward Island, 1888 Feb. 16, L. R. XIV Appeal Cases 98.

² Rangoon, 1869 Dec. 11, VI Moore N. S. 302.

³ S. C. Nova Scotia, 1887 Nov. 15, L. R. XIII Appeal Cases 160.

TOTAL LOSS.

by salvors, towed into port, and there sold together with the cargo, by order of the Admiralty Court, for less than the actual cost of the salvage services, it was held, in actions upon policies on the ship and freight respectively, that, assuming the possession by salvors of a derelict vessel to be only a constructive total loss, the subsequent sale constituted an actual loss of both ship and cargo.

SIR BARNES PEACOCK, p. 167; — To constitute a total loss within the meaning of a policy of marine insurance, it is not necessary that a ship should be actually annihilated or destroyed; it may, as in the case of capture and sale upon condemnation, remain in its original state and condition; it may be capable of being repaired if damaged; it may be actually repaired by the purchaser, or it may not even require repairs. If it is lost to the owner by an adverse valid and legal transfer of his right of property or possession to a purchaser by a sale under a decree of a court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated: *Mullett v. Sheddon*, 13 East 304. The following cases were also commented upon or referred to: *Stringer v. English and Scottish Marine Insurance Company*, L. B. 42 Q. B. 676; *Holdmorth v. Wise*, B. & C. 794; *Parry v. Aberdeen*, 9 B. & C. 411; *Roux v. Salvador*, 3 Bing (N. C.) 267; *Mellish and Andrews*, 15 East, 13; *Green v. Royal Exchange Assurance Company*, 6 Taunt, 68; *Idle v. Royal Exchange Assurance Company*, 8 Taunt, 755; *Robertson v. Clarke*, 1 Bing, 445; *Cambridge v. Anderson*, 1 Ry & Mood, 60; *Farnworth v. Hyde*, 18 C. B. (N. S.) 865; *Cary v. Bun*, 8 Appeal Cases, 393.

WARRANTY OF SEAWORTHINESS.**JENKINS V. HEYCOCK**¹

58. In a voyage policy, there is a contract of warranty of seaworthiness, but in a time policy, there is generally no such contract. However, that warranty, if it exists in the latter case, is only at the commencement of the risk, and is not a continuing obligation cast upon the assured while the risk is running.

SIR JOHN JERVIS, p. 360:—Then comes the question, assuming she was seaworthy when she started on her voyage, is there a further warranty that she shall be seaworthy at every intermediate port she touches at, pending the progress or continuance of her voyage, which is to last for a specified time? Now, if it had been a voyage policy, there is no question, although there had been a warranty of seaworthiness when she started on her voyage, there would be no warranty that she should be seaworthy at an intermediate port at which she touched, which she is endeavouring to make intermediate; and if it were to be held (as I took the liberty of pointing out in the course of the argument) that there was a warranty in a time policy

¹ *Calcutta*, 1856 June 14, VIII Moore 351.

WARRANTY OF SEAWORTHINESS.

that the ship shall be seaworthy at her departure, and at every intermediate port during the currency of the time policy, it would be holding that there is a warranty to a greater extent in a time policy than there would be in a voyage policy.

Therefore, I apprehend in this case, as in all cases, we must abide by the general rule, that a policy of indemnity, being a written instrument, the terms of that instrument must be construed subject to certain conditions, one of which is, that in a voyage policy, custom and decision have annexed to that contract a warranty of seaworthiness, and that there is no custom and no decision which warrants the court in saying, that in a time policy any such warranty attaches. If it were necessary for the decision of the case, we should be inclined to go to the full extent of what Lord Campbell says in the House of Lords. It is unnecessary, however, to do so in this case; because, if there was a warranty, it was satisfied at the time the voyage commenced, and there was no warranty at any intermediate port.

BICCARD V. SHEPHERD ¹

59. A contract of insurance was made on copper ore on board a ship "at and from the anchorage of H. and N. to S. to commence upon the loading on board the ship at and from the above ports." Part of the ore was loaded at H. and part at N. The ship was seaworthy at H., but became unseaworthy before leaving N., in consequence of being over-loaded, and was lost on her voyage from N. to S.

The Judicial Committee held that the insurer was entitled to recover for the ore shipped at H., but not in respect of the ore loaded at N., as the policy covered two risks, and the sea voyage was to be considered as beginning at different times, and that the implied warranty that the ship should be there fit to carry the additional, as well as the original cargo, appeared by the evidence not to have been complied with.

60. There is a warranty as to the seaworthiness of the ship loaded as well in an insurance upon goods as upon the ship itself, and this warranty is of a similar nature in both cases.

LORD WENSLEYDALE, p. 493:—Some propositions in the doctrine of the implied warranty of seaworthiness, which form part of every contract of marine insurance on voyages (for to time-policies it does not apply) are perfectly settled. They are laid down in the case of *Dixon v. Sadler* (5 Mee. and Wels. 405), in which I gave the judgment of the Court of Exchequer, with the concurrence of my brethren, founded on the principle laid down in several previous cases. *Buck v. Royal Exchange Assurance Co.* (2 Bar. and Ald. 72); *Walker v. Mailland* (5 Bar. and Ald. 171); *Holdsworth v. Wise* (7 Barn and Cr. 794); *Bishop v. Pentland*, *ib.* 219; *Shore v. Bentall*, *ib.*

¹ Cape of Good Hope, 1861 July 18, XIV Moore 471.

WARRANTY OF SEAWORTHINESS.

798, note:—"There is an implied warranty in every insurance of a ship, that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to perform the voyage insured, and to encounter the ordinary perils at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk; and if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as if it was a voyage down a canal or river, and thence to and on the open sea, it is enough if the vessel be at each stage of the navigation in which the loss happens properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage, and their negligence or misconduct is no defence to an action on the policy, when the loss has been immediately occasioned by the perils insured against," (5 Mee and Wels. 414) and this principle prevents many nice and difficult inquiries, and causes a more complete indemnity to the assured, which is the object of the contract of assurance. Our law differs in this respect from the law of America where the implied warranty extends to the conduct of the owner and crew during the whole voyage. There is a warranty of a similar nature in an assurance upon goods with respect to the ship upon which they are loaded.

COMMERCIAL MARINE COMPANY V. NAMAQUA MINING CO. ¹

61. There is an implied warranty in every insurance contract on voyages that the vessel shall be seaworthy. But this rule is satisfied if the ship is properly equipped and in good order at the stage of the navigation at which the loss happened.

LORD WENSLEYDALE, p. 506:—"Some propositions in the doctrine of the implied warranty of seaworthiness, which form a part of every contract of marine insurance on voyages (for to time policies it does not apply) are perfectly settled. They are laid down in the case of *Dixon v. Sudler*, 5 M. & W. 414, in which I gave the judgment of the Court of Ex. with the concurrence of my brethren, founded on the principle laid down in several previous cases: (*Burk v. R. E. Assurance Co.*, 2 B. & Ald. 73; *Walker v. Maitland*, 5 B. & Ald. 171; *Holdsworth v. Wise*, 7 B. & C. 749; *Bishop v. Pentland*, H. 219; *Shore v. Bentall*, H. 728, note.)

THE QUEBEC MARINE INSURANCE COMPANY V. THE COMMERCIAL BANK OF CANADA ²

62. A policy on a steam vessel was effected in Montreal, containing the following exceptions to the risk "rottenness,

¹ Cape of Good Hope, 1862 Dec. 21, V Law Times N. S. 504

² Quebec, 1870 April 20, VII Moore N. S. 1.

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inherent defects, and other unseaworthiness; theft, barratry, or robbery; bursting or explosion of boilers, or collapsing of flues, or breakage of machinery, unless occasioned by unavoidable external cause, or fire ensued therefrom, etc." At the time of the starting there was a defect in the boiler of the vessel, which was not apparent, but was discovered when she got into salt water where she became disabled by reason of such defect, and was compelled to put into port to repair. After being repaired, she proceeded to sea, but encountering bad weather, was lost.

The Judicial Committee held that the implied warranty of seaworthiness in a voyage policy applies to the state of the vessel at the commencement of the voyage; that this condition had not been complied with, as the vessel sailed with a defect of such a nature that, so long as it remained unremedied, it made her unseaworthy for the voyage, and that although the defect was afterwards repaired, before loss, it had rendered the policy null.

63. Held also that the enumeration of excepted losses contained in the policy, and among these "loss from unseaworthiness," did not exclude the implied warranty of seaworthiness, as it did not expressly specify an intention to exclude it.

LORD PENZANCE, p. 11: — The case of *Dixon v. Sadler, M. & W.* 414, and the other cases which have been cited, leave it beyond doubt that there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward of a whaling voyage, for some definite, well recognized, and distinctly separate stage of the voyage. This principle has been sanctioned by various decisions; but it has, been equally well decided that the vessel, in cases where these several distinct stages of navigation involve the necessity of a different equipment or state of seaworthiness, must be properly equipped, and in all respects seaworthy for each of these stages of the voyage respectively at the time when she enters upon each stage, otherwise the warranty of seaworthiness is not complied with.

It was argued, that the obligation thus cast upon the assured to procure and provide a proper condition and equipment of the vessel to encounter the perils of each stage of the voyage, necessarily involves the idea that between one stage of the voyage and another he should be allowed an opportunity to find and provide that further equipment which the subsequent state of the voyage requires; and no doubt that is so. But that equipment must, if the warranty of seaworthiness is to be complied with, be furnished before the vessel enters upon that subsequent stage of the voyage which is supposed to require it.

INTERDICTION

GROUNDS OF

In re CHARLES NICOLLE ¹

64. According to the law of Jersey, it is necessary, in order to place a man under "curatelle" to satisfy the court not only that he is prodigal or likely to mismanage his property, but that he is so by reason of his habitual intemperance in the matter of drink. Mere prodigality without proof of habitual drunkenness will not suffice to support an interdiction; and in order to establish the intemperance the court must have not merely the evidence of relatives (*les électeurs*), but the presentment after examination of *les six principaux*. A similar procedure must take place for the removal of the interdiction.

INTEREST

See BANK AND BANKING, BILLS OF EXCHANGE, HYPOTHEC, SALE.

INTERNATIONAL LAW

ALTERATION OF LAWS IN BRITISH COLONIES.

JEPHSON v. RIERA ²

65. The power to alter the laws in a conquered country is vested in the crown, without any limitation as to the advice under which it may be exercised; so it may be done by Proclamation, Letters Patent or Charters under the Great Seal, or by Order in Council. Of course, it can also *a fortiori* be done by an Act of Parliament.

MAYOR OF LYONS v. EAST INDIA COMPANY ³

66. That portion of the English law which incapacitates aliens from holding real estate and from transmitting it by will has never been introduced into the East Indies.

67. Calcutta being a district acquired in a country already peopled at the time of the acquisition, and having a government of its own, there was no general introduction of the English law in that country. More especially, the laws concerning aliens cannot be considered as in force, where they are so inapplicable to the circumstances of the settlement.

The principles of the introduction of English law in colonies were thus explained:—

¹ Jersey, 1879 Dec. 16, L. R. V Appeal Cases 346.

² Gibraltar, 1835 July 3, III Knapp 130.

³ Bengal 1836 Dec. 12, 1 Moore 175.

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LORD BROUGHAM, p. 272:—It is agreed, on all hands, that a foreign settlement obtained in an inhabited country, by conquest, or by cession from another power stands in a different relation to the present question, from a settlement made by colonizing, that is, peopling an uninhabited country. In the latter case it is said, that the subjects of the crown carry with them the laws of England, there being, of course, no *lex loci*, in the former case it is allowed, that the law of the country continues until the crown, or the Legislature changes it. This distinction, to this extent is taken in all the books; it is one of the six propositions stated in *Campbell v. Hall*, as quite clear, and no matter of controversy in the case; and it had been laid down in *Calvin's* case; in *Dutton v. Howell*; in *Blankard v. Gold Salk*, by Lord Holt, delivering the judgment of the court; and nowhere more distinctly and accurately than in the decision of this court. Two limitations of this proposition are added, to which it may be material that we should attend. One of these refers to conquests, or cessions. In *Calvin's* case an exception is made of infidel countries; for which it is said, in *Dutton v. Howell*, that Lord Coke gives no authority, yet it must be admitted as being consonant to reason. But this is treated in terms as an "absurdity" by the court in *Campbell v. Hall*. The other limitation refers to new plantations, Mr. Justice Blackstone says, that only so much of the English law is carried into them by the settlers as is applicable to their situation, and to the condition of an infant colony. And Sir W. Grant, in *Atty Gen. v. Stuart*, applies the same exception even to the case of conquered or ceded territories, into which the English law of property has been generally established. Upon this ground, he held that the statute of Mortmain does not extend to the colonies governed by the English law, unless it has been expressly introduced there, because it had its origin in a policy peculiarly adapted to the circumstances of the mother country.

THE ADVOCATE GENERAL OF BENGAL V. RAVEE SURNOMOYE
DORSEE¹

68. The question in this cause was whether by express enactment the English law of *felo de se* against suicide, including the forfeiture attached to it, was extended in the year 1844 to Hindoos destroying themselves in East India.

Their Lordships considered that this part of the English law was not introduced in that country when it became subject to the crown of England.

THE RIGHT HON. LORD KINGSDOWN, p. 59:—Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own state; and those who live amongst them and become members of their community become also partakers of, and subject to the same laws. But when they establish themselves, in a populous, civilized

¹ Calcutta, 1863 June 30. II Moore N. S. 22.

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and Christian country, the settlers become subject to the laws of that country. But this was not the nature of the first settlement made by a few foreigners for the purpose of trade in a very populous and highly civilized country under the government of a powerful Mahomedan ruler, with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards.

If the settlement had been made in a Christian country of Europe the settlers would have become subject to the law of the country in which they settled. It is true that in India they retained their own laws for their own government within the Territories which they were permitted, by the ruling powers of India, to establish, but this was not on the ground of general international law or because the crown of England or the laws of England had any proper authority in India, but upon the principles explained by Lord Stowell in a very celebrated and beautiful passage of his judgment in the case of the *Indian Chief vs. Rob. Adm. Rep. 237.*

The law and usages of Eastern countries where Christianity does not prevail are so at variance with all the principles, feeling and habits of European Christians, that they have usually been allowed by the indulgence or weakness of the potentates of those countries to retain the use of their own laws, and their factories have for many purposes been treated as part of the territory of the Sovereign from whose dominions they came. But the permission to use their own laws by European settlers does not extend those laws to Natives within the same limit who remain for all intents and purposes subject of their own Sovereign and to whom European laws and usages are as little suited as theirs are to European. These principles are too clear to require any authority to support them but they are recognized in the judgment to which we have also referred.

But if the English laws were not applicable to Hindoos on the first settlement of the country, how could the subsequent acquisition of the rights of sovereignty by the English crown make any alteration? It might enable the crown by express enactment to alter the laws of the country, but, until so altered, the laws remained unchanged. The question, therefore and the sole question in this case is: whether by express enactment the English law of *felo de se*, including the forfeiture attached to it, had been extended in the year 1844 to Hindoos destroying themselves in Calcutta.

We were referred by Mr. Melville in his very able argument to the Charter of Charles II in 1661 as the first and indeed the only one which in express terms introduces English law into the East Indies. It gave authority to the Company to appoint governors of the several places where they had or should have Factories and it authorized such governors and their council to judge all persons belonging to the said Company or that should live under them in all causes whether civil or criminal according to the laws of the kingdom of England and to execute judgment accordingly.

The English crown, however, at this time clearly had no jurisdiction over native subjects of the Mosque and the charter was admitted by Mr. Melville as we understood him, to apply only to the

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European servants of the Company; at all events it could have no application to the question now under consideration. The English law civil and criminal has been usually considered to have been unapplicable to Natives within the limits of Calcutta in the year 1726 by the Charter 13th, Geo. I. Neither that, nor the subsequent charters expressly declare that the English law shall be so applied, but it seems to have been held to be the necessary consequence of the provision contained in them. But none of these charters contained any form applicable to the punishment by forfeiture or otherwise of the crime of self-murder, and with respect to other offences to which the charters did extend the application of the criminal laws of England to Natives not Christians to Mahomedans and Hindoos has been treated as subject to qualifications, without which the execution of the law would have been attended with intolerable injustice and cruelty.

To apply the law which punishes the marrying a second wife whilst the first is living to a people amongst whom polygamy is a recognized institution would have been monstrous and accordingly it has not been so applied. In like manner the law which in England most justly punishes as a heinous offence the criminal knowledge of a female under ten years of age cannot with any propriety be applied to a country where puberty commences at a much earlier age and where females are not unfrequently married at the age of ten years. Accordingly in the case referred to in the argument the law was held not to apply.

Is the law of forfeiture for suicide one which can be considered properly applicable to Hindoos and Mahomedans.

The grounds on which suicide is treated in England as an offence against the law and punished by forfeiture of the offender's goods and chattels to the King are stated more fully in the case of *Hales v. Petit*, *Plowden's Reports*, p. 261 than in any other book which we have met with. It is there stated that it is an offence against nature because against God and against the King. Against nature because against the instinct of self-preservation; against God because against the commandment: Thou shall not kill, and a *felo de se* kills his own soul; against the King in that thereby he loses a subject.

Can these considerations extend to native Indians not Christians, not recognizing the authority of the Decalogue and owing at the time when this law is supposed to have been introduced no allegiance to the King of Great Britain?

The nature of the punishment also is very little applicable to such persons. A part of it is that the body of the offender should be deprived of the rites of Christian burial in consecrated ground.

The forfeiture extends to chattels real and personal, but not to real estate; these distinctions at least in the sense in which they are understood in England not being known or intelligible to Hindoos and Mahomedans.

Self-destruction though treated by the law of England as murder and spoken of in the case to which we have referred in *Plowden* as the worst of all murders is really as it affects society and in a moral

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and religious point of view of a character very different not only from all other murders, but from all other felonies. These distinctions are pointed out with great force and clearness in the notes attached to the Indian Code as originally prepared by Lord Macaulay and the others commissioners. The truth is that the act is one which in countries not influenced by the doctrine of Christianity has been regarded as deriving its moral characters altogether from the circumstances in which it is committed, sometimes as blamable, sometimes as justifiable, sometimes as meritorious or even an act of positive duty. In this light suicide seems to have been viewed by the founders of the Hindoo Code who condemn it in ordinary cases as forbidden by their religion; but in others, as in the well known instances of Suttee and self-immolation under the car of Juggernaut, treat it as an act of great religious merit.

We think, therefore, the law under consideration unapplicable to Hindoos, and if it had been introduced by the charters in question with respect to Europeans, we should think that Hindoos would have been excepted from its operation. But that it was not so introduced appears to us to be shown by the admirable judgment of Sir Barnes Peacock in this case and if it were not introduced then as regards natives it never had any existence.

It would not necessarily follow that, therefore, it never had existed as regards Europeans. That question would depend upon this, whether when the original settlers under the protection of their own sovereign were governed by their own laws, those laws included the one now under consideration, whether an offence of this description was an offence against the king's peace for which he is entitled to claim forfeiture, whether the factory could for this purpose be considered as within his jurisdiction. In that case it might be that the subsequent appointment of governors by the Act of the 33rd Geo. III would render effectual a right previously existing, but for the recovery of which no adequate remedy had been previously provided.

PAPAYANNI V. THE RUSSIAN STEAM NAVIGATION
AND TRADING COMPANY. THE "LACONIA" ¹

69. The Consular court, at *Constantinople*, has a jurisdiction *in rem* in case of collision between British and foreign ships, but it does not involve the administration of the common law of *England*. The question must be solved by reference to the usage which has prevailed, respecting proceeding *in rem*.

DR. LUSHINGTON, p. 181:—In considering what power and what jurisdiction was conceded to *Great Britain* within certain portions of the Turkish dominions, it must always be borne in mind that in almost all transactions, whether political or mercantile a wide difference subsists in the dealings between an Oriental and a Christian State and the intercourse between two Christian nations.

¹ Consular Court, Constantinople, 1862 July 25, 11 Moore N. S. 161.

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This is an undoubted fact. Many of the reasons are obvious, but this is not the occasion for discussing them. It is sufficient for us to know and acknowledge that such is the fact.

It is true beyond all doubt, that, as a matter of right, no State can claim jurisdiction of any kind within the territorial limits of another independent State.

It is also true that between two Christian States all claims for jurisdiction of any kind, or exemption from jurisdiction, must be founded on Treaty, or engagements of similar validity. Such, indeed, were factory establishments for the benefit of trade.

But though, according to the laws and usages of European nations, a cession of jurisdiction to the subjects of one state within the territory of another, would require, generally at least, the sanction of a treaty, it may by no means follow that the same strict forms, the same precision of treaty obligation, would be required or found in the intercourse with the *Ottoman Porte*.

It is true, as we have said, that if you inquire as to the existence of any particular privileges conceded to one state in the dominions of another, you would, amongst European nations, look to the subsisting treaties; but this mode of incurring obligations, or of investigating what has been conceded, is matter of custom and not of natural justice.

Any mode of proof by which it is shown that a privilege is conceded is, according to the principles of natural justice, sufficient for the purpose. The formality of a treaty is the best proof of the consent and acquiescence of parties, but it is not the only proof, nor does it exclude other proof; and more especially in transactions with Oriental States.

Consent may be expressed in various ways; by constant usage permitted and acquiesced in by the authorities of the State, active assent, or silent acquiescence, where there must be full knowledge.

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SCHACHT V. OTTER. THE "OSTSEE" ¹

70. Restitution of a ship seized as a prize may be attended according to the circumstances of the case, with any one of the following consequences: *First*. The claimants may be ordered to pay to the captors their costs and expenses. *Second*. The restitution may be simple restitution, without costs, or expenses, or damages to either party. *Third*. The captors may be ordered to pay costs and damages to the claimant.

71. Costs and damages, when decreed against the captors, are not inflicted as a punishment on the captors, but as affording compensation to the injured party. In order to exempt captors from costs and damages in case of restitution, there must be some circumstances connected with the ship

¹ Admiralty, 1855 Feb. 26, IX Moore 150.

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or cargo affording reasonable ground for belief that the ship or cargo might prove a lawful prize.

72. What amounts to such a probable cause as to justify a capture cannot be properly defined, as it is to be regulated by the peculiar circumstances of each case. It is not necessary to prove vexatious conduct on the part of the captors in order to subject them to condemnation in costs and damages. Neither will honest mistake, though occasioned by an act of government, relieve the captors from liability to compensate a neutral for damages which the captors by their conduct have caused the neutral to sustain.

THE RIGHT HON. T. PEMBERTON LEIGH, p. 157:—A ship may, by her own misconduct, have occasioned her capture, and in such a case it is very reasonable that she should indemnify the captors against the expenses which her misconduct has occasioned.

Or, she may be involved, with little or no fault or her part, in such suspicion as to make it the right, or even the duty of a belligerent to seize her. There may be no fault either in the captor or the captured, or both may be in fault, and in such cases there may be *damnum absque injuriâ*, and no ground for anything but simple restitution.

Or, there may be a third case, where not only the ship is in no fault, but she is not by any act of her own, voluntary or involuntary, open to any fair ground of suspicion. In such a case a belligerent may seize at her peril, and take the chance of something appearing on investigation to justify the capture; but, if he fails in such a case, it seems very fit that he should pay the costs and damages which he has occasioned.

The appellants insists that the circumstances of this case bring it within the last of these rules.

The general principles applicable to this point are stated with great clearness in a document of the very highest authority, the Report made to King Geo. III, in 1753, by the then judge of the Admiralty Court, and the law officers of the crown, one of whom was Mr. Murray (afterwards Lord Mansfield), and they are laid down in these terms (Pratt's Story, p. 4): "The law of nations allows, according to the different degrees of misbehaviour, or suspicion arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received by the claimant, in case of acquittal and restitution. On the other hand, if a seizure is made without cause, the captor is adjudged to pay costs and damages."

This passage (with others) is cited by Lord Stowell (then Sir William Scott), and Sir John Mitchell, in their letter to the American minister, in 1794, as containing an accurate statement of the laws of maritime capture.

These rules have been recognised and acted upon by all the chief maritime powers: *Pratt's Story*, p. 35; *Traité des Prises Maritimes*, vol. II, p. 54; The "*Statira*," 2 *Cranch*, 99; The "*Maria Shædes*," 3 *Rob.* 152; The "*Triton*," 4 *Rob.* 79; The "*William*,"

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6 Rob. 316; The "*Actæon*," 2 Dods, 51; The "*Elizabeth*," 1 Acton, 10.

The result of these authorities is, that in order to exempt a captor from costs and damages in case of restitution, there must have been some circumstances connected with the ship or cargo affording reasonable ground for belief that one or both, or some part of the cargo, might prove, upon further inquiry, to be lawful prize.

What shall amount to probable cause, so as to justify a capture, cannot be defined by any exact terms. The question was discussed before Mr. Justice Story, in the case of The "*George*" (1 Mason, 24), when it was contended that, in order to exempt captors from costs and damages, the case against the ship at the time of seizure must be such as *prima facie* to warrant condemnation, or, at all events, that a restoration by a Court of Prize, without further proof, is conclusive evidence of a defect of probable cause. Mr. Justice Story expresses his dissent from these propositions, in which we agree with him; and he then expresses himself in these terms (p. 26): If, therefore, there be a reasonable suspicion of illegal traffic, or a reasonable doubt as to the proprietary interest, the national character, or the legality of the conduct, of the parties, it is proper to submit the cause for adjudication before the proper Prize Tribunal; and the captors will be justified, although the court should acquit without the formality of ordering further proof.

Neither in the texts, nor in the decided cases to which we have thus referred, do we find it stated that, in order to subject captors to condemnation in costs and damages, vexatious conduct on their part must be proved (except as some degree of vexation is necessarily implied in the detention of a vessel without reasonable cause, after she has been reached), or that honest mistake, though occasioned by the act of the government of which they are subjects, can relieve them from their liability to make good to a foreigner and neutral (and with this case alone we are dealing) the damage which, by their conduct, he has sustained.

Nor is it easy to perceive upon what grounds of reason or justice such excuses could rest.

If costs and damages were inflicted as a punishment on captors, honest intention would be a consideration of the greatest weight, but the principle on which they are awarded, is that of affording compensation to a party who has been injured. Vexatious conduct on the part of the captors has, in some cases, been alluded to as removing all reluctance on the part of the judge to award costs and damages, as in *The "Nemesis"* (Edwards, Rep. 50); or as forming a ground for what are termed vindictive damages; or for subjecting the captors to costs and damages, or depriving them of their expenses, when, but for such conduct, they might have been entitled to their expenses against the claimants, as in the cases of *The "Speculation"* (2 Rob. 293), *The "Washington"* (6 Rob. 275), and several others; but no case was cited to us at the Bar, nor have we been able to find any in which wilful misconduct on the part of the captors has been stated to be a necessary ingredient in an ordinary condemnation in costs and damages.

So as to errors occasioned by the proceedings of their own govern-

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ment. The captors act as the agents of the State of which they are citizens, and which must ultimately be responsible for their acts. Prize Courts afford the remedy as between the individuals, which otherwise must be sought by the government of the claimants against the government of the captors; but the mode of proceeding cannot affect the right to redress, and, if the State could not urge its own mistakes as a justification of its own wrong, neither, it should seem, should individual citizens be permitted to do so.

The law of nations upon these points appears to us to be settled by decisions both in the American and European Courts. *The "Charming Betsey,"* 2 *Cranch*, 64; *The "Actæon,"* 2 *Dod*, 51; *The "Refus,"* 2 *Dod*, 55.

Surely, if the absence of misconduct on the part of the captors; if honest error, occasioned by the blunders of the government, or the consideration of hardship upon individual officers, acting in discharge of their duties, could in any case afford a protection against the claims of a neutral, such protection would have been afforded by the circumstances of these cases. Yet the captors were held liable by the Court of Admiralty, and were afterwards, we understand, indemnified at the expense of the public.

Page 171:—But it is said, that although there might be no ground for suspecting this ship of breach of blockade, yet a captor is not confined to the case upon which the seizure was made, and that a vessel sent in for adjudication upon one ground may, if the facts warrant it, be subjected to condemnation on another.

Of this rule there is no doubt.

P. 179:—It is then said, that there is a distinction to be made in these cases between officers of Her Majesty's navy and privateers; that the court has a large discretion in such subjects, and ought not to press with severity upon men who are acting in the discharge of a difficult and important duty.

That, for many purposes, there is a clear distinction to be made between public and private ships of war, and that there are the strongest reasons for making such distinction, can admit of no doubt, but as regard the particular rule in question, that a capture without probable or reasonable cause exposes the captors to condemnation in costs and damages, we find it laid down, in the text books and the decided cases, both foreign and domestic, as applicable to captors generally, to public and private ships indifferently. In the case of *"The Lively"* (1 *Gallis*, 327), Mr. Justice *Story* states distinctly: "Public and private ships must be governed by the same principle."

Again as to the discretion to be exercised by the Court. When the application of a rule depends on the absence or existence of misconduct in both or either of the litigants, the greater or less degree of that misconduct, the existence or absence of suspicion attaching to a particular ship or cargo, the greater or less degree of it, and the causes to which it is, in whole or in part, to be attributed, it is obvious that there must necessarily be a very large discretion left to the judge, for scarcely any two cases can in all such respects be precisely the same. But when once, in the opinion of the judge with

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whom the decision rests, a particular case is brought clearly within a particular rule, it should seem that his discretion is at an end. It is not a question merely of costs of suit, but of reparation for a wrong, which, when an accidental loss has afterwards occurred, may extend to the whole value of the ship and cargo.

Nor, if we were at liberty to rely on settled rules upon our own notions of justice and policy, are we quite prepared to say that we should do so in this instance? The laws which we are to lay down cannot be confined to the British navy; the rule must be applied to captors of all nations. No country can be permitted to establish an exceptional rule in its own favour, or in favour of particular classes of its own subjects. On the law of nations, foreign decisions are entitled to the same weight as those of the country in which the tribunal sits. *America* has adopted almost all of her principles of prize law from the decisions of English courts, in cases to which they are applicable, with greater respect than of those of the distinguished jurists of *France* and *America*. Whatever is held in *England* to justify or excuse an officer of the British navy will be held by the tribunals of every country both on this and the other side of the *Atlantic*, to justify or excuse the captors of their own nation.

By the usage of all countries, captors have a great interest in increasing the number of prizes. The temptation to send in ships for adjudication is sufficiently strong. Is it too much to say, that when no ground of suspicion can be shown, and all that the captor can allege is, that he did wrong under a mistake, he should make good in temperate damages the injury which he has occasioned? Ought a captor to be permitted to say to the captured: "True, nothing suspicious appeared in your case at the time of seizure, but, upon further inquiry, something might have been discovered. I had a right to take my chance; you have nothing to complain of. I have subjected you to no unnecessary inconvenience. Go about your business, and be thankful for your escape?"

We cannot think that this would be deemed a satisfactory answer to a British neutral seized by a foreign belligerent.

NORTHCOTE V. DOUGLAS. THE "FRANCISKA" ¹

73. Whatever may be the demerits of a ship, she cannot be condemned for a breach of blockade, unless, at the time when she committed the alleged offence, the port for which she was sailing was legally in a state of blockade, and was known to be so, by the master or owner.

74. The admiral of the fleet must be presumed to have carried with him from *England* sufficient authority to blockade such of the enemy's ports as he might deem advisable.

¹ Admiralty, 1855 August 1, X Moore 37.

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75. Notice of a blockade must not be more extensive than the blockade itself.

76. The existence and extent of a blockade may be so generally known that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and such knowledge may supply the place of a direct communication from a blockading squadron, yet the fact, with notice of which an individual is so to be fixed, must be one which admits of no reasonable doubt.

THE RIGHT HON. T. PEMBERTON LEIGH, p. 54:—If a partial, modified blockade is to be enforced against neutrals, justice seems to require that the modifications intended to be introduced should be notified to neutral States, and that they should be fully apprized what acts their subjects may or may not do. They cannot reasonably be exposed to the hardship of either abstaining from all commerce with a place in such a state of uncertain blockade, or of having their ships sent to the country of the belligerent, in order to learn there, from the decision of its Court of Admiralty, whether the conduct they have pursued is, or is not, protected by an equitable interpretation of an instrument in which they are not expressly included.

Page, 57:—It is contended by the appellant that in a case of ingress of a port subject to a blockade only *de facto* of which there has not been any official notification, guilty knowledge cannot be inferred in an individual from general notoriety, and that a ship is always entitled under such circumstances to warning from the blockading squadron before she is exposed to seizure.

To this proposition their Lordships are unable to accede. If a blockade *de facto* be good in law without notification, and a wilful violation of a known legal blockade be punishable with confiscation, propositions which are free from doubt, the mode in which the knowledge has been acquired by the offender, if it be clearly proved to exist, cannot be of importance.

Nor does there seem for this purpose to be much difference between ingress, in which a warning is said to be indispensable, and egress, in which it is admitted to be unnecessary.

The fact of knowledge is capable of much easier proof in the one case than in the other; but when once the fact is clearly proved, the consequences must be the same. The reasoning of the learned judge of the court below in this case, and the language of Lord Stowell in the "*Adelaide*", reported in the note to the "*Neptunus*" (2 Rob. 111); and The "*Hurtige Havle*" (3 Rob. 324) are conclusive upon this point.

But while their Lordships are quite prepared to hold that the existence and extent of a blockade may be so well and so generally known, that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and that knowledge so acquired may supply the place of a direct communication from the blockading squadron, yet the fact, with notice of which the indivi-

BREACH OF BLOCKADE.

dual is to be fixed, must be one which admits of no reasonable doubt. "Any communication which brings it to the knowledge of the party," to use the language of Lord *Stowell* in *The "Rolla"* (6 *Rob.* 367), "in a way which could leave doubt in his mind as to the authenticity of the information."

Again the notice to be inferred from general notoriety, must be of such a character that if conveyed by distinct intimation from a competent authority it would have been binding; the notice cannot be more effectual because its existence is presumed, than it would be if it were directly established in evidence; the notice to be inferred from the acts of a belligerent, which is to supply the place of a public notification, or of a particular warning, must be such as, if given in the form of a public notification or of a particular warning, would have been legal and effectual.

For this purpose the notice of the blockade must not be more extensive than the blockade itself. A belligerent cannot be allowed to proclaim that he has instituted a blockade of several ports of the enemy when in truth he has only blockaded one; such a course would introduce all the evils of what is termed a paper blockade, and would be attended with the grossest injustice to the commerce of neutrals. Accordingly a neutral is at liberty to disregard such a notice, and is not liable to the penalties attending a breach of blockade, for afterwards attempting to enter the port which really is blockaded.

THE QUEEN V. HILDBRANDT. The "ALINE" AND "FANNY."¹

77. In this cause the principle laid down in the above appeal of *"Schacht v. Otter, The "Ostsee"*, that a claimant, upon restitution of the ship is entitled to costs and damages from the captors, only in circumstances where the ship was in no fault, and was not by any act of her own, voluntarily or involuntarily, open to any fair ground of suspicion, was approved.

BALTAZZI V. RYDER. The "PANAGLION RHOWBE"²

78. The general, but not universal rule, is that where a ship is condemned for breach of blockade, the cargo follows the same fate.

79. The presumption is against a vessel captured while entering a blockaded port, and an imperative and overwhelming necessity for so doing must be established by the owner to exempt him from condemnation.

80. The owners of the cargo cannot save their cargo by pleading their own ignorance, as the illegal act of the master renders them liable, although it was done without their consent or knowledge, or even against their wishes.

¹ Admiralty, 1856 July 10, X Moore 491.

² Admiralty, 1858 June 28, XII Moore 168.

BREACH OF BLOCKADE.

THE RIGHT HON. T. PEMBERTON LEIGH, p. 186: — But, the subsequent cases appear to have carried the rule much further, and to have established, that when the blockade was known, or might have been known, to the owners of the cargo at the time when the shipment was made, and they might, therefore, by possibility be privy to an intention of violating the blockade, such privy shall be assumed as an irresistible inference of law, and it shall be competent to them to rebut it by evidence; that in cases of blockade, for the purpose of affecting the cargo with the rights of the belligerent, the master shall be treated as the agent for the cargo as well as for the ship

We find, therefore, a series of authorities establishing a general rule, which, like all general rules, may in its application to particular cases be occasionally attended with hardship, but which, nevertheless, may be necessary to prevent fraud, and may on the whole, promote the progress of justice. It is a rule not applicable exclusively to neutrals, but which applies with equal force to all persons attempting to violate a blockade, though they may be the subjects or the allies of the country which has established it. See EVIDENCE: *new evidence*. *Northcote v. Douglass*. The "*Franciska*."

CIVIL STATUS.

In re ADAM ¹

81. The civil status of a party resident in the *Mauritius* must be determined by the laws of England, but the rights and liabilities incidental to such status must be determined by the law of the colony.

FOREIGN ENLISTMENT.

REGINA v. CARLIN. THE "SALVADOR" ²

82. There was an insurrection in the Island of Cuba and the insurgents had formed themselves into a body of people acting together, undertaking and conducting hostilities. A ship was fitted out and armed, within Her Majesty's Dominions and without her permission, to be used by the insurgents. Held, by the Judicial Committee, that it was an infringement of the Foreign Enlistment Act. (59 Geo. 3, ch. 69) and the forfeiture of the ship was maintained.

DYKE v. ELLIOTT. THE "SAUNTLETT" ³

83. An English steam-tug was engaged by a French war-ship to tow a Prussian ship, captured as prize of war, from British waters to a port of the captors. The Judicial Committee held that such engagement was despatching a ship, within the meaning of Sect. 8 of the Foreign Enlistment

¹ *Mauritius*, 1837 July 4, 1 Moore 460.

² *V. A. Bahamas*, 1870 June 28, XXIII Law Times N. S. 203.

³ *Admiralty*, 1872 Feb. 9, VIII Moore N. S. 428.

FOREIGN ENLISTMENT.

Act of 1870, for the purpose of taking part in the naval service of a belligerent, and condemned the tug as a forfeiture to the crown.

FOREIGN LAW. See EVIDENCE: *law of foreign States.*

FOREIGN LAW IN COLLISION CASES.THE "HALLEY" ¹

84. In an action against a British ship for damages suffered by collision which took place in a foreign port, the Judicial Committee held, that the claim being based on acts committed within the territory of a foreign State, the party claiming reparation before a British court was not entitled to the benefit of the foreign law against the admitted provisions of the statute laws of England, in respect of compulsory pilotage, by which no such liability, as provided by the Belgian law, existed, as it is contrary to principle and authority to hold that an English court will enforce a foreign law, and give a remedy in the shape of damages, in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.

THE LORD JUSTICE SELWYN, p. 276: — It is true that, in many cases the courts of England inquire into and act upon the laws of foreign countries, as in the case of a contract entered into in a foreign country, where, by express reference, or by necessary implication, the foreign law is incorporated with the contract, and proof and consideration of the foreign law, therefore, become necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English court admits the proof of the foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is, in their Lordships' opinion, alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a foreign municipal law and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.

JURISDICTION OF STATES.

PAPAYANNI V. THE RUSSIAN STEAM NAVIGATION AND TRADING CO. ²

85. The ordinary way of granting a cession of jurisdiction to the subjects of one State within the territory of another,

¹ Admiralty, 1868 June 7, V Moore N. S. 293.

² Consular Court, 1863 July 25, II Moore N. S. 161.

JURISDICTION OF STATES.

is by treaty or engagement of similar validity, but it may also be acquired by constant usage permitted and acquiesced in by the authorities of the State, by active assent, or even by silent acquiescence where there must be full knowledge.

86. But, as a matter of right, no State can claim jurisdiction of any kind within the territorial limits of another independent State.

DAMOCHAR GORDHAM V. DEORAM KANJI¹

87. A transfer of British territories from ordinary British jurisdiction "to the supervision, laws and regulations of a political agency," amounting to a cession of British territory to a native state in India, depriving the crown of its territorial rights over the transferred district, or the persons resident therein of their rights as British subjects cannot be made without an Act of the Legislature.

DIRECT UNITED STATES CABLE COMPANY
V. ANGLO-AMERICAN TELEGRAPH COMPANY²

88. Under the general law of nations is to be found an universal agreement that harbours, estuaries and landlocked bays belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is a "bay" for this purpose.

89. It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay, the bay is part of its territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation. As to English common law: see *Fitzherbert*. "*Carone*," 399; *Hale, De jure Maris*, p. 1, c. 4; *Reg. v. Cunningham, Bell's Cr.*, c. 86.

90. The above principles were applied in the construction of statutes incorporating the above companies; and an injunction was granted in behalf of the respondents to prevent the appellants from infringing the company respondent's right to lay and work a cable within Conception Bay, which lies on the East of Newfoundland, between two promontories distant more than twenty miles. The cable which was laid about three miles from the shore was maintained.

¹ Bombay, 1875 March 28, L. R. I Appeal Cases 332.

² Newfoundland, 1877 Feb. 14, L. R. II Appeal Cases 394.

JURISDICTION OF COURTS OF JUSTICE.

THE SECRETARY OF STATE IN COUNCIL OF INDIA

V. KAMACHEE BOYE SAHABA ¹

91. The transactions of independent sovereign States between each other are governed by special laws, and are not subject to the ordinary principles administered by ordinary courts of justice, which have neither the means of decreeing what is right in such a peculiar matter, nor the power of enforcing any decision which they may make.

THE "MALVINA" ²

92. The court of Admiralty has jurisdiction in case of damage by collision between a barge and a sea-going foreign vessel in a river within the body of a county.

LA BLACHE V. RANGEL. THE "MINA" ³

93. In the court of Admiralty, it is the nationality of the vessel, and not the nationality of the individual seaman suing for his wages, that regulates the course of procedure and the jurisdiction of the court.

BULKELEY V. SCHRETZ ⁴

94. A railway company existing in a foreign country does not fall under the enactments of the English Joint Stock Companies Acts of 1856-57, so as to enable Her Majesty's Consular court in Egypt, to issue a sequestration against such of the members of the company as were resident within the jurisdiction of that court, for not complying with an order of that court to register the company as one of limited liability under the English act.

MESSINA V. PRETROCCHINO ⁵

95. A foreign judgment of a competent court is conclusive, and not open to examination by another court, unless the judgment impeached carries on the face of it manifest error; as if it is shown to have been obtained by fraud or wanting in the condition of natural justice. Such judgment cannot be applied to persons other than those who were parties to the litigation decided by it except in cases where the judgment is *in rem*.

¹ Madras, 1859 July 9, XIII Moore 22.

² Admiralty, 1863 April 13, VIII Law Times N. S. 403.

³ Admiralty, 1869 Dec. 17, V Moore N. S. 51.

⁴ C. C., Constantinople 1871 July 17, VIII Moore N. S. 175.

⁵ Malta, 1872 Feb. 3, VIII Moore N. S. 375.

LAW OF THE DOMICILE GOVERNS WILLS.

CROKER V. THE MARQUIS OF HERTFORD ¹

96. There is a wide distinction between wills and contracts, the *lex loci regit actum* applies to the latter, the former are governed by the *lex domicilii*.

97. Thus a man domiciled in England, made in Italy where he was residing, an holograph codicil disposing of personal property situated in the United States of America. It was held that the validity of the will was governed by the law of England.

BREMER V. FREEMAN ²

98. The form and solemnities of a will are governed by the law of the domicile of the testator.

99. The maxim "*Mobilia sequuntur personam*" is part of the *jus gentium*. It follows, therefore, that the post mortuary distribution of the effects of a deceased person must be made according to the laws of his domicile, at the time of his death; and it equally follows, that if the law of the country allowed the deceased to make a will, the will must be in the form and executed with the solemnities which that law requires.

LORD WENSLEYDALE, p. 357:—That the law of the testator's domicile at the time of making the will, and of the death of the testator, when there is no intermediate change of domicile, must govern the form and solemnities of the instrument, can no longer be questioned. The maxim "*Mobilia sequuntur personam*" has long prevailed, and whatever the origin of that doctrine may be, whether it was derived from a fictitious annexation of moveables to the person, or from an enlarged policy growing out of their transitory nature, it has (as Mr. Justice Story observes) so general a sanction among all civilized nations that it may now be treated as a part of the *jus gentium*, Story, "*Conflict of Laws*," sect. 380. It follows from this maxim that the post mortuary distribution of the effects of a deceased person must be made according to the law of his domicile at the time of his death, if he dies without a will; and it equally seems to follow that if the law of that country allowed him to make a will, the will must be in the form and with the solemnities which that law required; and it was so decided in the case of *Stanley v. Bernes* (3 Hagg. Ecc. Rep., 373), which doctrine, we believe, has been generally approved, Story, "*Conflict of Laws*," sect. 408.

BLACKWOOD V. THE QUEEN ³

100. The *lex domicilii* governs the personal assets of a testator for the purpose of enjoyment and succession, but for the purpose of legal representation, of collection and administration they are governed by the law of the locality.

¹ Canterbury, 1844 February 21, IV Moore 339.

² Canterbury, 1857 March 7, X Moore 306.

³ Victoria, 1882 Nov. 22, L. R. VIII Appeal Cases 82.

LAW GOVERNING BOTTOMRY CONTRACT.DURANTY V. HART. THE "HAMBURG" ¹

101. The validity of a Bottomry Bond, taken in a foreign port upon a foreign ship, freight and cargo, the owners of the cargo being English, and the ship and cargo being proceeded against in England, is to be governed by the general maritime laws, and not by the *lex loci contractus*, or the law of the country the vessel belongs to. See **BOTTOMRY AND RESPONDENTIA**: *right of the master to effect loan on*.

LAW GOVERNING MOVEABLES.McMULLEN V. WADSWORTH ²

102. Article 1260 of Civil Code, interpreted in connection with article 6, establishes the legal community of property between the consorts in the absence of any marriage contract. But, however, moveable property still remains, by article 6, governed by the law of the owner's international domicile. *For the remarks of their Lordships, see DOMICILE: marriage in the Province of Quebec, same cause.*

LEX LOCI CONTRACTUS.ALLEN V. KEMBLE ³

103. If a bill of exchange is drawn in one country and payable in another, and the bill is dishonoured, the drawer is liable, according to the *lex loci contractus*, and not according to the law of the country where the bill was made payable.

104. But where a bill is drawn generally, the liabilities of the drawer, acceptor and indorsers, are governed by the laws of the countries in which the drawing, acceptance and indorsement respectively take place.

THE RIGHT HON. T. PEMBERTON LEIGH, p. 321:—The drawer, by his contract, undertakes that the drawee shall accept and shall afterwards pay the bill, according to its tenor, at the place and domicile of the drawee if it be drawn and accepted generally. At the place appointed for payment, if it be drawn and accepted payable at a different place from the place of domicile of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance, or non-payment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with his interest, damages and costs, as the law of the country where he contracted may allow. In every case of a bill drawn in one country upon a drawee in another, the intention and the agreement are, that the bill shall be paid in the

¹ Admiralty, 1863 Dec. 9, 11 Moore N. S. 289.

² S. C. Quebec, 1889 July 27, L. R. XIV Appeal Cases 631

³ British Guiana, 1848 April 13, V1 Moore 314.

LEX LOCI CONTRACTUS.

country upon which it is drawn. But it is admitted, that if this payment be not so made, the drawer is liable, according to the laws of the country where the bill was drawn, and not of the country upon which the bill was drawn.

THE PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY V. SHAND ¹

105. The general rule is, that the law of the country where a contract is made governs as to its nature, its interpretation and the obligations flowing therefrom.

LORD JUSTICE TURNER, p. 290 : — Parties to a contract are either the subjects of the Power there ruling, or as temporary residents owe it a temporary allegiance: in either case equally they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations. Their Lordship are speaking of general rule; there are, no doubt, exceptions and limitations on its applicability.

NATIONALITY.

DRUMMOND'S CASE ²

106. A person who possesses the characters both of a French subject under the law of France and of a British subject under the statute 13 Geo. 3, c. 26, as the grandson of a natural born British subject, although both he himself and his father were born in a foreign country, is not entitled to claim compensation for a loss he has sustained from a confiscation of his property by the French government under a treaty between Great Britain and France, giving compensation for such a loss to British subjects.

DANIEL V. COMMISSIONERS FOR CLAIMS ON FRANCE ³

107. The same doctrine applies to a corporation of British subjects in a foreign country, existing for objects in opposition to British law, and under the control of a foreign government.

108. The individual members of such a corporation are also equally incapacitated from making any claim, as British subjects, for the loss of their income arising from the funds of such a corporation.

¹ Mauritius, 1865 June 23, III Moore N. S. 272.

² England, 1834 April 10, II Knapp 235.

³ England, 1825 Nov. 25, II Knapp 23. Case of the English Roman-Catholic Colleges in France.

NATIONALITY.

LONG V. COMMISSIONERS FOR CLAIMS ON FRANCE ¹

109. A corporation of Irishmen, existing in a foreign country, and under the control of a foreign government, must be considered as a foreign corporation, and is not therefore entitled to claim compensation for the loss of its property under a treaty, giving the right of doing so to British subjects.

SIR JOHN LEACH, MASTER OF THE ROLLS, *described as follows the laws of France and England on aubains*, p. 56:—Thus the law of France, with respect to individual strangers, was nearly the same as the law of England, for aliens may purchase real property here, but they cannot transfer it, because it belongs to the king. There is, however, this difference between the laws of England and France, that by the law of France it seems to have been permitted to the aubains, or strangers, to hold the property till their death, and their succession alone belonged to the king. It is not so here, for if it is found by an inquisition, that any real property belongs to an alien, it may immediately be seized into the king's hands, without waiting for the alien's death. If, therefore, this property in question was the property of individuals, they had no right whatever to transmit it.

COUNT WALL'S CASE ²

110. The son of a British father who had entered into the service of France, and taken the oath of knight of the Order of St. Louis, was held to be entitled to the character of a British subject, although he himself was born in France of a French mother, and had served in the French army.

JEPHSON V. RIERA ³

111. A person residing in an Island ceded by Great Britain, who, immediately after the cession, comes over to England, and, finding that the climate does not agree with his health, returns to the Island, in which he had left his family and resides with them there for upwards of six years, and then emigrates with them to another country under the government of Great Britain, retains the character of a British subject; and his children, born after the capitulation of the Island, and before its final cession by treaty, are not aliens.

HON. THOMAS ERSKINE, p. 149:—As to the objection to the status of the widow as an alien, their Lordships are of opinion that if the appellants had established, at the trial, the fact upon which they now rely, unless they could have retained his domicile in Minorca

¹ England, 1832 Feb. 27, II Knapp 51.

² England, 1834 June 20, III Knapp 13.

³ Gibraltar, 1835 July 3, III Knapp 130.

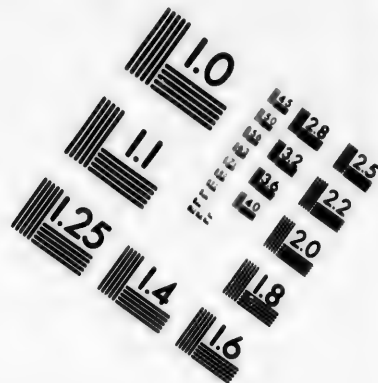
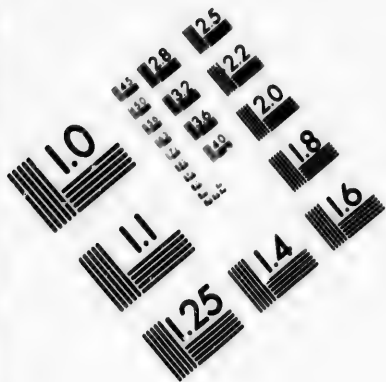
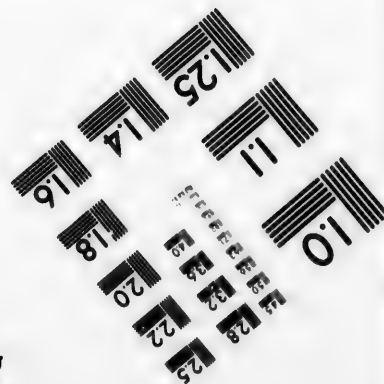
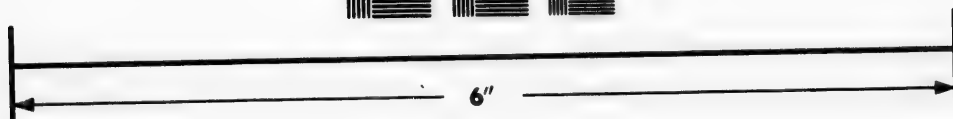
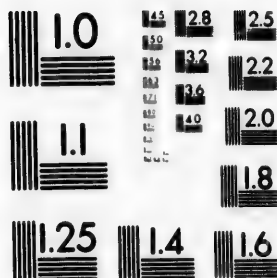
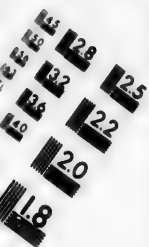


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NATIONALITY.

with the intention of transferring his allegiance under the cession of the island from the Crown of Great Britain to the Crown of Spain, that the mere fact of his returning to the island, and continuing to reside till 1790, would not have deprived him of his character and privileges as a British subject.

COUNT DE WALL'S case¹

112. A native-born Irishman, a British subject, married a French woman domiciled in France. They resided in France till the breaking out of the French revolution, when they emigrated to Germany. The wife died in the lifetime of her husband, without ever having come within the territory of Great Britain.

Held, that she did not by her marriage become a British subject, for, while she remained abroad, she was not within the allegiance of the crown of England.

CREMIDI V. POWELL. THE "GERASIMO"²

113. The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country, has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of trade, as a subject of the power under whose dominion he carries it on, and as an enemy of those with whom that power is at war.

114. A temporary occupancy of a territory by an enemy's force, does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies.

SORENSEN V. THE QUEEN. THE "BALTICA"³

115. A neutral residing in an enemy's country, as consul of a neutral state, and who also traded there as a merchant, is to be regarded as an enemy. See *ALIENS: legal status of aliens in France*, *DROIT D'AUBAINE: aliens*.

PAYMENT OF MORTGAGE DUE IN ANOTHER COUNTRY.**CAMPBELL V. DENT**⁴

116. The appellant, a merchant in Scotland, had two mortgages on plantations belonging to the respondent and

¹ Commissioners for liquidating the claims of British subjects on France, 1848 Feb. 16, VI Moore 216.

² Admiralty, 1857 March 4, XI Moore 88.

³ Admiralty, 1857 Dec. 11, XI Moore 141.

⁴ British Guiana, 1838 Feb. 15, II Moore 292.

PAYMENT OF MORTGAGE DUE IN ANOTHER COUNTRY.

situated in Demerara. An agreement was made in Scotland between the parties for the discharge of those mortgages by bills of exchange. The Judicial Committee held that this contract was to be interpreted according to the law of Scotland.

THE RIGHT HON. DR. LUSHINGTON, p. 307: — We are of opinion that the contract must under the circumstances be considered as a Scotch contract being made in Scotland, and to be performed in Scotland, the parties living in Scotland at the time and one of them resident there. It relates to the payment of a debt, and the circumstance of that debt being secured by mortgage on land in a foreign country does not we think alter the principle. It is clear by the construction of the contract itself, that if any question had arisen with respect to the payment of those bills the decision of that question must be governed by the law of Scotland. If it was necessary to follow this subject up further, I think it would be easy to find authorities from writers on public law that that the mere fact of the money having being advanced on mortgage in a foreign country does not render it requisite that the contract should be governed by the law of that country in which the mortgaged land is situated.

PRESCRIPTION.

HER HIGHNESS RUCKMABOYE V. LULLOOBHOY MOTTICHUND¹

117. The law of prescription or limitation is a law relating to procedure and is governed by the *lex fori*.

SIR JOHN JERVIS, p. 35: — The arguments in support of the plea are founded upon the legal character of a law of limitation or prescription, and it is insisted, that such legal character of the law of prescription has been so much considered and discussed among writers upon jurisprudence, and has been so often the subject of legal decisions in the courts of law of this and other countries, that it is no longer subject to doubt and uncertainty. In truth, it has become almost an axiom in jurisprudence, that a law of prescription, or law of limitation, which is meant by that denomination, is a law relating to procedure having reference only to the *lex fori*. *Story's Conflict of Laws*, Edit 1841, sect. 579 and 580. Consistently with this view, while the courts of almost all civilized countries entertain causes of action which have originated in a foreign country, and adjudicate upon them according to the laws of the country, in which they arose, yet such courts respectively proceed according to the prescription of the country in which it exercises its jurisdiction.

PRINCIPLES OF BLOCKADE.

NORTHCOTE V. DOUGLASS. THE "FRANCISKA"²

118. Relaxation of blockade in favour of belligerents, to the exclusion of neutrals, is illegal, and the effect of such

¹ Bombay, 1852 Nov. 27, VIII Moore 4.

² Admiralty, 1755 August 1, X Moore 98.

PRINCIPLES OF BLOCKADE.

relaxation is to give to the neutrals the same rights as the belligerents.

119. The principles which regulate the right of a belligerent to exclude neutrals from a blockaded port were explained by the Judicial Committee.

THE RIGHT HON. T. PEMBERTON LEIGH, p. 48:— In effect, therefore, neutrals only would be excluded from that commerce which belligerents might safely carry on; and the question is, whether by the Law of Nations such exclusion be justifiable; and, if not, in what manner and to what extent neutral powers are entitled to avail themselves of the objection.

That such exclusion is not justifiable is laid down in the clearest and most forcible language in the following passage of the judgment now under review. The judgment was rendered by the Right Hon. Dr. Lushington; judge of the High Court of Admiralty:

"The argument stands thus: By the Law of Nations a belligerent shall not concede to another belligerent, or take for himself, the right of carrying on commercial intercourse prohibited to neutral nations; and, therefore, no blockade can be legitimated that admits to either belligerents a freedom of commerce denied to the subjects of states not engaged in the war. The foundation of the principle is clear, and rooted in justice; for interference with neutral commerce at all is only justified by the right which was conferred of molesting the enemy, all relations of trade being by war itself suspended. To this principle I entirely accede; and I should regret to think that any authority could be cited from the decisions of any British courts administering the Law of Nations, which could be with truth asserted to maintain a contrary doctrine."

The learned judge after discussing the question how far licences to enter blockaded ports would invalidate a blockade, and pointing out the important distinction between blockades according to the ordinary Law of Nations, and the blockades introduced during the last war by the *Berlin* and *Milan* decrees on the one hand, and the British Orders in Council on the other, and between special licences granted for a particular occasion and licences granted indiscriminately, proceeds: "I think that if the relaxation of a blockade be, as to belligerents, entire, the blockade cannot lawfully subsist; if it be partial, and such as to exceed special occasion, that, to the extent of such partial relaxation, neutrals are entitled to a similar benefit." And he concludes his able discussion of this part of the case in these words: "With respect to the present question I, therefore, have come to the conclusion, that as Russian vessels might have left the ports of *Courland* up to the 15th of *May*, the subjects of neutral States ought to be entitled to the same advantages, and if there be any vessel so circumstanced I should hold her entitled to restitution. I think the remedy should be commensurate with the grievance."

The learned judge holds that such relaxation does not affect the general validity of the blockade.

In order to judge how far this conclusion can be maintained, it is necessary to consider upon what principles the right of a belligerent

PRINCIPLE OF BLOCKADE.

to exclude neutrals from a blockaded port rests. That right is founded, not on any general unlimited right to cripple the enemy's commerce with neutrals by all means effectual for that purpose, for it is admitted on all hands that a neutral has a right to carry on with each of two belligerents during war all the trade that was open to him in times of peace, subject to the exceptions of trade as to contraband goods and trade with blockaded ports. Both these exceptions seem founded on the same reason, namely, that a neutral has no right to interfere with the military operations of a belligerent either by supplying his enemy with materials of war, or by holding intercourse with a place which he has besieged or blockaded: *Grotius, de jure Belli et Pacis, lib. III, ch. I, sect. V*; *Wheaton, "Elements of International Law," vol. II, p. 228-30*; *Vattel, B. III, ch. VII, sect. 17*; *The "Frederick Molke," 1 Rob. 87*; *The "Betsey," 1 Rob. 93*; *The "Vrouw Judith," 1 Rob. 151*; *The "Rolla," 6 Rob. 372*; *The "Success," 1 Dods, 134*.

It is contended that the objection of a neutral to the validity of a blockade, on the ground of its relaxation by a belligerent in his own favour, is removed if a Court of Admiralty allows to the neutral the same indulgence which the belligerent has reserved to himself or granted to his enemy. But their Lordships have great difficulty in assenting to this proposition. In the first place, the particular relaxation, which may be of the greatest value to the belligerents, may be of little or no value to the neutral. In the instance now before the court it may have been of the utmost importance to the *Great Britain* that there should be brought into her ports cargoes which, at the institution of the blockade, were in *Riga*; and it may have been for her advantage, with that view, to relax the blockade. But a relaxation to that extent and a permission to neutrals to bring such cargoes to British ports may have been of little or no value to neutrals.

The counsel on both sides at their Lordships' bar understood that the learned judge in this case intended thus to limit the rights of neutrals, and to place neutral vessels only in the same situation as Russians, under the Order in Council. Their Lordships would be inclined to give a more liberal interpretation to the language of the judgment; yet if this be done, the allowance of a general freedom of commerce, by means of export, to all vessels and to all places from a blockaded port, seems hardly consistent with the existence of any blockade at all.

Again, it is not easy to answer the objections which a neutral might make, that the condition of things which alone authorizes any interference with his commerce does not exist, namely, the necessity of interdicting all communication by way of commerce with the place in question; that a belligerent, if he inflicts upon neutrals the inconvenience of exclusion from commerce with such place, must submit to the same inconvenience himself; and that if he is to be at liberty to select particular points in which it suits his purpose that the blockade should be violated with impunity, each neutral, in order to be placed on equal terms with the belligerent, should be at liberty to make such selection for himself.

PRIZES OF WAR.

CREMIDI V. POWELL. THE "GERASIMO" ¹

120. It is the duty of the captor, as soon as possible, to send a prize to some convenient port in Her Majesty's dominions for adjudication, and to procure the examination in preparatory of the principal officers of the captured vessel, and to deposit in the admiralty court upon oath, all papers found on board the prize, in order that speedy justice may be done, and that the property, if illegally seized, may be restored, with as little delay as possible, to the owners.

BATTEN V. THE QUEEN. THE "MARIA" ²

121. The Judicial Committee held that if any doubt exists as to the character of a ship claimed to be the property of a neutral, being still enemy's property, the rule is, that the claimant shall be put to strict proof of ownership and any circumstance of fraud or contrivance, or attempt at imposition on the court, in making out his title, is fatal to the claimant, and condemnation of the ship as enemy's property necessarily follows.

SORENSEN V. THE QUEEN. THE "ARIEL" ³

122. The sale of a ship absolutely and *bonâ fide* by an enemy to a neutral, *imminente bello*, or even *flagrante bello*, is not illegal.

123. Liens, whether in favour of a neutral or an enemy's ship, or in favour of an enemy on a neutral ship, are null and void, and are to be disregarded in a Court of Prize.

THE RIGHT HON. SIR JOHN PATTERSON, p. 129: — It is argued that war cannot be said to be imminent unless there be an embargo, or some similar act of the country about to be belligerent, and cases are cited in which such circumstances have occurred, but none of those cases go the length of laying down any positive rule as to the necessity of such circumstances. Their Lordships are of opinion, that there is abundant proof that the sale was made *imminente bello*, and in contemplation of it. Still, if the sale was absolute and *bonâ fide*, there is no rule of international law, as laid down by the courts of this country, which makes it illegal. Such a *bonâ fide* sale made even *flagrante bello* would be legal, much more *imminente bello*. The "*Ariel*" was in port at the time of the sale; therefore, the cases as to the illegality of sales *in transitu*, do not apply.

Was then this sale absolute and *bonâ fide*? Assuredly the time of the sale, the circumstance of the claimant making himself a neutral for the express purpose of buying this and the other ship, and his inability to pay the whole price, all tend to throw suspicion upon the

¹ Admiralty, 1857 March 4, XI Moore 89.

² Admiralty, 1857 July 4, XI Moore 271.

³ Admiralty, 1857 Feb. 20, XI Moore 119.

PRIZES OF WAR.

sa, and to make it incumbent on the court to look closely into the history of the transactions, it being obviously the intention of all parties to place the ship, by such sale, out of the reach of capture by the belligerent. If there had been facts leading to a well founded conclusion that a secret understanding existed between the seller and the claimant, that the ship should be restored to the seller in the event of no war breaking out, or in the event of a speedy peace, or that the ship should be employed by the claimant under the direction and for the benefit of the seller, the court would be bound to hold the sale to be collusive and void, and to condemn the ship as Russian property. But no such facts are even surmised in the case.

SORENSEN V. THE QUEEN. THE "BALTICA"

124. The question raised in this cause is the same as that in the above cause of the "Ariel," except that the sale of the "Baltica" had taken place while she was engaged in the prosecution of a voyage, *in transitu*. She sailed from Liban, an enemy's port, to Copenhagen, a neutral port, where she arrived and was taken possession of by the purchaser.

The Judicial Committee held that the sale, though *in transitu*, was valid, as the *transitus* had ceased when the vessel had come into the possession of the purchaser, which took place before the seizure.

125. A neutral while a war is imminent, or even after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid whether the subject of it be lying in a neutral or an enemy's port.

THE RIGHT HON. T. PEMBERTON LEIGH, p. 145:—The general rule is open to no doubt. A neutral while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor and vendee, is good also against a captor, if war afterwards unexpectedly break out. But, in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such case a mere transfer of documents which would be sufficient to bind the parties, is not sufficient to change the property as against captors, as long as the ship or goods remain *in transitu*.

With respect to these principles, their Lordships are not aware that it is possible to raise any controversy; they are the familiar rules of the English Prize court, established by all the authorities and are collected and stated, principally from the decisions of Lord Stowell, by Mr. Justice Story, in his "Notes on the principles and

PRIZES OF WAR.

practice of Prize courts," a work which has been selected by the British government for the use of its naval officers, as the best code of instruction in the Prize laws. The passages referred to, are to be found in pages 63 and 64 of that work.

The only question of law which can be raised in this case, is not whether a transfer of a ship or goods *in transitu*, is ineffectual to change the property, as long as the state of *transitus* lasts; but how long that state continues, and when, and by what means, it is terminated.

In order to determine the question, it is necessary to consider upon what principle the rule rests, and why it is that a sale which would be perfectly good if made while the property was in a neutral port, or while it was in an enemy's port, is ineffectual if made while the ship is on her voyage from one port to the other. There seem to be but two possible grounds of distinction. The one is, that while the ship is on the seas, the title of the vendee cannot be completed by actual delivery of the vessel or goods; the other is, that the ship and goods having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by the belligerent powers, until the voyage is at an end.

The former, however, appears to be the true ground on which the rule rests. Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the purpose of misleading, or defrauding captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great, that the courts have laid down as a general rule, that such transfers, without actual delivery, shall be insufficient, that in order to defeat the captors, the possession, as well as the property, must be changed before the seizure. It is true that, in one sense, the ship and goods may be said to be *in transitu* till they have reached their original port of destination; but their Lordships have found no case where the transfer was held to be inoperative after the actual delivery of the property to the owner. That the *transitus* ceases, when the property has come into the actual possession of the transferee, is a doctrine perfectly consistent with the decisions in the "*Danckebaar African*" (1 Rob. 107), and in the "*Negotie en Zeevaart*," on the authority of which the former case was decided. See EVIDENCE: new evidence. *The Queen v. Hildebrand. The "Alice" and The "Fanny."*

PROCEDURE REGULATED BY LEX FORI

LOPEZ VS. BURSLEM ET AL.¹

126. Procedure is regulated by the laws of the *forum*, and all persons residing or dealing within the British empire whether subjects of Her Majesty or aliens are bound to submit to the law made on this subject by Parliament.

LORD CAMPBELL, p. 303:—The British Parliament certainly has no general power to legislate for foreigners out of the dominions and beyond the jurisdiction of the British Crown, but it cannot be doubted

¹ Sierra Leone, 1843 Nov. 29, IV Moore 300.

PROCEDURE REGULATED BY LEX FORI.

for a moment that a British statute may fix a time within which application must be made for redress to the tribunals of the empire. This is matter of procedure, and becomes the law of the *forum*. On matters of procedure, all mankind, whether aliens or liege subjects, plaintiffs or defendants, appellants or respondents, are bound by the law of the *forum*. If a law were made upon this subject, working oppression and injustice to the subjects of a foreign State, that State might make representations and remonstrances against this law to our government; but while it remains in force, judges have no choice but to give it effect.

PUNISHMENT OF CRIMES.

THE ATTORNEY-GENERAL FOR THE COLONY OF HONG KONG
V. KWOK-A-SING¹

127. The distinction of crimes and the punishment of offences fall under the laws of the country where the act is committed.

LORD JUSTICE MELLISH, p. 198: — Moreover, although any nation may make laws to punish its own subjects for offences committed outside its own territory; still, in their Lordships' opinion, the general principle of criminal jurisprudence is that the quality of the act done depends on the law of the place where it is done. Now, the place as to what constitutes murder differs in different places. Suppose that a subject of *China* kills an Englishman within English territory, or on board an English ship, under circumstances which, according to English law, might amount to manslaughter only, could it possibly be right for the English government to surrender such a person to the Chinese government to be tried according to Chinese law, to which the distinction between murder and manslaughter may be wholly unknown.

RULES GOVERNING SHIPS ON SEA.

STEVENS V. GOURLEY. THE "CLEADON"²

128. A foreign vessel meeting another vessel is governed by the rule of the sea and not by the Admiralty regulations, but a British ship in tow of a steam-tug, meeting a foreign ship at night, is governed by the Admiralty regulations.

WILLIAMS V. GUTH. THE "CHANCELLOR"³

129. The Merchant Shipping Act of 1854 does not apply to a case of collision between a British and a foreign vessel in the Atlantic Ocean; the rule of the sea being then the governing law.

130. By this rule when two vessels are approaching each

¹ Hong Kong, 1873 June 19, L. R. V P. C. 198.

² Admiralty, 1860 Dec. 12, XIV Moore 92.

³ Admiralty, 1861 Feb. 18, XIV Moore 202.

RULES GOVERNING SHIPS ON SEA.

other, nearly on the same course, and both have the wind free, each vessel is bound to port her helm and run to starboard of the other; but when one vessel is close-hauled, the running ship (the vessel that has the wind free) is bound to make way for the close-hauled ship.

THE HAMBURGH AMERICAN STEAM NAVIGATION COMPANY V. THE NORTH OF SCOTLAND BANKING COMPANY. THE "ECLIPSE" * AND THE "SAXONIA" ¹

131. A collision took place between a British vessel and a foreign steamer in the Solent, between the Isle of Wight and the Hampshire coast.

Held, that the case was to be tried by the ordinary maritime law, as the Merchant Shipping Act, 17th and 18th Vict. ch. 104, sect. 296, 297, 298, had no application to the Solent, so as to affect a foreign ship navigating there.

When British and foreign ships meet on the high seas, that statute is not binding on either vessel.

132. The general maritime rules affecting vessels of all countries are that a vessel sailing free, or a steamship, is bound to give way to a vessel close-hauled; and, that the vessel close-hauled is bound to show a proper and sufficient light in time.

THE "ELIZABETH" ²

133. The 296th section of the Merchant Shipping Act, 1854, prescribing the rule as to ships meeting each other, does not apply to foreign ships meeting a British ship in the high seas; the Parliament of Great Britain having no jurisdiction over foreign vessels upon the high seas, and cannot, even if so disposed, without the consent of other nations, establish any law of navigation binding on them. In such a case the old rule of the sea prevails, by which a vessel that is close-hauled on the port tack must keep her course, and the vessel that has the wind free must get out of her way. What measures the vessel going free must take must depend on circumstances. See COLLISION: *parties in fault*.

SHIP ADOPTING BRITISH COLORS.

DIONISSIS V. THE QUEEN. THE "LAURA" ³

134. The registry, flag and pass of a ship carry with them the presumption that they are true and correct, and the owner of a ship who has adopted British colors and who

¹ Admiralty, 1861 Dec. 10, XV Moore 262.

² Admiralty, 1860 July 16, III Law Times 159.

³ V. A. Antigua, 1865 March 15, III Moore N. S. 181.

SHIP ADOPTING BRITISH COLORS.

has been seized for illegal acts, cannot escape the jurisdictions of the courts, in England, by proving that he is not an English subject and that his vessel is a foreign ship.

SLAVES TRADING.**DEL CAMPO ET AL V. THE QUEEN¹**

135. A foreign vessel may be seized under the Slave Abolition Act within a British port.

136. The trade of slaves is the joint act of the master of the ship and the owner, and they are jointly and severally responsible.

VALUE OF CURRENCY.**PILKINGTON V. COMMISSIONERS FOR CLAIMS ON FRANCE²**

137. A State having issued a decree confiscating all the debts due to the subjects of its enemy's country; a debtor paid to the confiscating State, the amount of his debt, in the currency of the time, which, however, was very much depreciated since the date of his declaration of his debt under the decree of confiscation.³ Held, that the confiscating State, having entered into a treaty to make compensation for all undue confiscations and sequestrations, was answerable for the debt in the currency at the time of the debtor's declaration, this not being a case between a debtor and creditor, but of reparation by a wrong-doer.

SIR WILLIAM GRANT, p. 18, referring to two cases stated in *Sir John Davis's Reports*, (Sir J. Davis R. J. 26 case of Mixt Monies, 6th Revolution of Judges,) remarked:—It is said if a man upon marriage receive 1,000 l. as a portion with his wife, paid in silver money, *causâ precontractus*, so that the portion is to be restored, it must be restored in equal good silver money, though the State shall have depreciated the currency in the meantime. So, if a man recover 100 l. damages, and he levies that in good silver money, and that judgment is afterwards reversed, by which the party is put to restore back all he has received, the judgment-creditor cannot liberate himself by merely restoring 100 l. in the debased currency of the time, but he must give the very same currency that he had received. That proceeds upon the principle, that if the act is to be undone, it must be completely undone, and the party is to be restored to the situation in which he was at the time the act to be undone took place.

INTERVENTION

See PRACTICE.

¹ Gibraltar, 1837 July 5, II Moore 15.

² England, 1821 Feb. 8, II Keapp 7.

³ The assignats was worth 30 deniers and fell down to 20 deniers.

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JUDGES

ASSIGNMENT OF SALARY.

ARBUTHNOT V. NORTON¹

1. In Madras the law provides that the representatives of a judge who has died in India, are entitled to a sum equal to six months' salary.

The Judicial Committee held, that although the common law will not allow the emoluments of an office to be alienated or assigned, as being against public policy, this sum of money not being emoluments of office, but being rather part of the judge's estate, could have been validly transferred by him for valuable consideration during his life time.

GROUND FOR REMOVING.

THE REPRESENTATIVES OF THE ISLAND OF GRENADA V. SANDERSON²

2. A petition was presented by the Assembly of the Island of Grenada praying for the dismissal of the respondent, the chief justice of the Island. The grounds of the petition were intemperance and arbitrary conduct, such as fining two magistrates for taking depositions of witnesses in the third instead of in the first person.

The petition was not entertained because of the length of time which had elapsed since the date of the acts complained of.

MONTAGU V. THE LIEUTENANT-GOVERNOR OF VAN DIEMAN'S LAND³

3. After a full investigation by the Governor and Council of the Island of Van Dieman's Land into the conduct of the appellant, one of the judges of the colony, it was established by evidence that the appellant availing himself of his judicial function obstructed his creditors from recovering debts due by him; he was at the same time found to be involved to a large extent in hazardous transactions and pecuniary embarrassment.

The Judicial Committee held that these reasons were sufficient to justify the Governor and Council in removing the appellant from office.

¹ Madras, 1846 Feb. 9, V Moore 210.

² Grenada, 1847 Feb. 11, VI Moore 38.

³ Van Dieman's Land, 1849 July 3, VI Moore 489.

PRECEDENCE OF See PREROGATIVE OF THE CROWN: *iisdem verbis*.

REASONS OF JUDGES IN RENDERING JUDGMENT. See PRACTICE: *iisdem verbis*.

REHABILITATION OF

CLOETE V. THE QUEEN¹

4. The Recorder of the district of Port Natal having been suspended by the Lieutenant-Governor for contempt of his authority and misconduct, the Judicial Committee without giving their reasons reversed his order and advised Her Majesty to pay the Recorder his salary as if no order of suspension had been made.

RECUSATION OF See PRACTICE: *iisdem verbis*.

RESPONSIBILITY OF

CALDER V. HALKET²

5. The privilege of a judge of not being liable for any of his judicial acts exists only to the extent of his jurisdiction, and therefore, where there is no jurisdiction, there is no privilege. However, the party claiming against a judge must prove that this latter acted in bad faith and knowing that he had no jurisdiction.

Mr. BARON PARKE, p. 7:—.....; for English judges, when they act wholly without jurisdiction, whether they may suppose they had it or not, have no privilege; and the justices of the peace, whether acting as such, or in their judicial character, in cases of summary conviction, have no other than that of having notice of action, a limitation of time for bringing it, a restriction as to venue, the power of tendering amends, and of pleading the general issue, with certain advantages as to costs.

P. 78:—It is clear, therefore, that a judge is not liable in trespass for want of jurisdiction, unless he knew, or ought to have known, of the defect; and it lies on the plaintiff, in every such case, to prove that fact.

GAHAN V. LAFITTE³

6. The action was in damages for false imprisonment, to the amount of £5,000. The respondent had been condemned, for contempt of court and wicked libel, to be imprisoned until such contempt should be purged. On his release from gaol he took his action alleging that the court which condemned him was not constituted as a court of justice, as the judges sitting in it were illegally appointed. He succeeded in obtaining in the court below a judgment for £3,000.

¹ Port Natal, 1854 Feb. 20, VIII Moore 484.

² Bengal, 1840 July 8, III Moore 75.

³ St. Lucia, 1842 July 6, III Moore 382.

RESPONSIBILITY OF

The judgment was confirmed, but the amount was reduced to £1,500.

BARTON V. FIELD. THE "WINWICK" ¹

7. In order to render a judge liable to penal consequences for directing a decree of sale of a ship, after he had been served with an inhibition issued under the authority of the Judicial Committee, it is not sufficient to show that he has committed an error of judgment; it must be proved that, in addition to there being error, it was wilful error proceeding from corrupt or improper motives.

JUDGMENT**CONSTRUCTION OF**

HAWKSFORD ET AL V. GIFFORD ²

8. The practice of the court below, in the colony, cannot prevail against the construction of a judgment given by their Lordships who consider it to be the natural one.

EFFECT OF

BALFOUR V. WATT ³

9. An order of the Chancery court in Jamaica to the effect that a certain legacy be paid out of the estate of a testator, having being duly registered, has the force of a judgment at law and constitutes the legatee a judgment creditor.

IN JERSEY ISLAND,

LE BRETON V. ENNIS ⁴

10. In Jersey, a majority of the judges constituting the court must concur in the judgment, and if they are equally divided, the bailiff has the casting vote.

11. In this cause, which was an action in damages for defamation, the court consisted of the bailiff and six jurats. Three of the latter were of opinion to dismiss the action; two were of opinion to give judgment for plaintiff; and one was of opinion "that the court could not pass a judicial sentence against the defendant, and that, therefore, the parties ought to be sent out of court, each bearing his own costs." The bailiff gave no vote; and the judgment was recorded as dismissing the action with costs. The Judicial Committee, proceeding to render the judgment that ought to have been rendered by the court below, reversed the judgment and awarded £56.00 as damages in behalf of appellant, plaintiff in the court below, and costs.

¹ Gibraltar, 1843 Nov. 28, IV Moore 273.

² Jersey, 1887 Dec. 18, LVI Law Times N. S. 32.

³ Jamaica, 1853 Feb. 2, VIII Moore 190.

⁴ Jersey, 1844 Feb. 6, IV Moore 323.

JUDICIAL COMMITTEE

JURISDICTION OF

In re GOULD ET AL ¹

12. A petition was presented to the Judicial Committee to obtain the redress of torts suffered by petitioners in consequence of public works done by the government. The petition was dismissed, as the Judicial Committee has only jurisdiction in appeals from the colony, and not in first instance, the petitioners having their remedy before the courts in the Island of Jersey.

In re GEORGE WHITFIELD ²

13. The petitioner was condemned by default in the court below for frauds committed against the Revenue laws. By his petition in dolence he prayed to be relieved from the sentence for alleged irregularities. The petition was dismissed, but the cause was remitted to the court below with liberty to petitioner to plead to the action.

In re MUIR ³

14. The Judicial Committee has no jurisdiction to grant an order, in the nature of a mandamus to an inferior court, to enter up judgment for a party upon a writ of error, but can only recommend as their opinion that the court should do so.

In re ASSIGNEES OF MANNING ⁴

15. The Judicial Committee has no jurisdiction over judges refusing to proceed as they ought to do, but they may be given to understand that it is their bounden duty to proceed with the case, or to enter judgment, and if they do refuse they must take the consequences.

SMITH V. THE JUSTICES OF SIERRA LEONE ⁵

16. A fine imposed by a court of record upon an advocate for contempt of court cannot be remitted by the Judicial Committee, although the judgment is rescinded and the appellant reinstated in the practice of his profession with an unimpeached character. But their Lordships may recommend that such fine be remitted.

In re BUTTS ⁶

17. The Judicial Committee has no jurisdiction on a petition complaining that the court below has refused to grant

¹ Jersey, 1838 Feb. 10, II Moore 188.

² Jersey, 1838 Dec. 10, II Moore 269.

³ Tobago, 1839 Dec. 5, III Moore 150.

⁴ Antigua, 1840 June 30, III Moore 154.

⁵ Sierra Leone, 1841 Jan. 8, III Moore 361.

⁶ British Guiana, 1842 June 20, IV Moore 92.

JURISDICTION OF

an Order of *præ et concurrentie* and to award the moneys to be paid to petitioner *sub cautione de restituendo*, although it has recognized his preferential claim by definitive sentence which has been carried into appeal, and asking that order be given to the judges of the Supreme Court of British Guiana to entertain his application.

RAINY V. THE JUSTICES OF SIERRA LEONE ¹

18. The Judicial Committee has no jurisdiction to entertain an appeal from orders made by a court of record in the colonies, inflicting fines upon a practitioner for contempts of court; such court being the sole judge of what constituted the contempts.

Upon a reference by the Colonial Office to the Judicial Committee, referring the whole matter of complaint against the judge concerning the contempts and the inflicting of the fines, for their advice and opinion; the Judicial Committee advised the crown to remit part of the fines, which, by an Order in Council, was directed.

GUNDAHUR SEAL V. SREEMUTTY RADDAMONEY DOSSEE ²

19. Although the Judicial Committee has no jurisdiction to entertain any application in an appeal until the petition of appeal is lodged, in circumstances where it appeared that an inquiry was pending before the court below which might render the prosecution of the appeal unnecessary, the proceedings on the appeal were suspended and the time prescribed by rule 5 of the Order in Council of the 13th June 1853, for prosecution thereof, was extended until further order.

HOW ET AL V. KIRCHNER ET AL ³

20. No step was taken in this appeal by the appellants to prosecute the appeal either by entering an appearance or lodging a petition of appeal. The transcript had been transmitted to the Council office, but no agent had been appointed to act on behalf of the appellants. Motion was made by respondents in November, 1856, to dismiss the appeal for non-prosecution. A question being raised whether the court had jurisdiction to make an order to dismiss in such circumstances, there being no petition of appeal to Her Majesty lodged in the Privy Council office, and no reference

¹ Sierra Leone, 1853 July 2, VIII Moore 47.

² Calcutta, 1855 Feb. 19, IX Moore 411.

³ New South Wales, 1857 Dec. 16, XI Moore 21.

JURISDICTION OF

of such appeal to the Judicial Committee, their Lordships declined to make any order upon the motion.

D'ALLAIN V. LE BRETON ¹

21. The Judicial Committee has no jurisdiction to make an order upon the Bailiff of the Island of Jersey to force him to admit the petitioner to take the oaths and practice as an advocate in the Royal courts. ²

ROBERTSON V. THE GOVERNOR GENERAL OF NEW SOUTH WALES ³

22. The Judicial Committee has no jurisdiction to enter into the consideration of a dismissal of a public officer who held his office *durante bene placito*, unless by the express command of Her Majesty.

POWER OF RECTIFYING ERRORS IN JUDGMENTS.

RAJUNDERNARAIN V. BIJAI GOOIND SING ⁴

23. It is a well settled principle of law that a judgment once rendered cannot be changed, nevertheless the Judicial Committee can rectify any error which has been introduced in the redaction of a judgment.

LORD BROUGHAM, p. 126:—It is unquestionably the strict rule, and ought to be distinctly understood as such, that no cause in this court can be re-heard, and that an order once made, that is, a report submitted to His Majesty and adopted, by being made an Order in Council, is final, and cannot be altered. The same is the case of the judgments of the House of Lords, that is, of the Court of Parliament, or of the King in Parliament as it is sometimes expressed, the only other supreme tribunal in this country. Whatever, therefore, has been really determined in these courts must stand, there being no power of rehearing for the purpose of changing the judgment pronounced; nevertheless, if by misprision in embodying the judgments, errors have been introduced, these courts possess, by common law, the same power which the Courts of Record and Statute have of rectifying the mistakes which have crept in.

See PRACTICE : *amendment of judgment.*

JURISDICTION**ADMIRALTY COURT.**

BERNARD V. HYNÉ. THE "SARACEM" ⁵

24. In the decision of cases, properly within the jurisdiction of the court of Admiralty, equitable considerations

¹ Jersey, 1857 Feb. 17, XI Moore 64.

² The 16th December 1859, the Queen in Council confirmed an Act of the State of Jersey to open the Bar to duly qualified British subjects. Compensation was given to the six advocates who heretofore had alone the right to practice before the Royal Court, XIII Moore 263.

³ New South Wales, 1858 June 14, XI Moore 288.

⁴ Bengal, 1836 Nov. 29, I Moore 126.

⁵ Admiralty, 1847 Feb. 16, VI Moore 56.

ADMIRALTY COURT

ought to have their weight; but it does not thence follow that the court of Admiralty has jurisdiction to do all that courts of Equity may do. In actions instituted by persons suing, either for themselves, or on behalf of themselves and others, for the administration of assets, or the distribution of a common fund, in which several persons are interested, or upon which they have claims, the Admiralty court has no jurisdiction.

25. In this cause, different creditors, the owners of the ship and part of the cargo, and the owners of the remaining portion of the cargo claimed the distribution of the proceeds of the sale of the ship, and it was held that the Admiralty court had no jurisdiction to decree a rateable distribution.

ADMIRALTY COURT IN BOMBAY.

LOUGHNAM V. HAJI JOOSUB BHULLADINA. THE "HYDROOS" ¹

26. By the Bombay Charter, the admiralty jurisdiction of the Supreme court is the same as the Admiralty court in England; and the rules of practice of this latter court are also in force in Bombay.

HOW DETERMINED.

EMERY V. BINNS ²

27. In actions of debt or contract, it is the amount recovered by the verdict, and sanctioned by the judgment of the court, that decides the question of jurisdiction as well as the question of costs.

IN PERSONAL ACTIONS.

LUCHMEECHUND V. MULL ³

28. In the case of a partnership having its place of business in a particular district, in which the books are kept and the general business is transacted, it was held that, at the close of the partnership, the cause of action of one of the partners for the balance of account against the other partner originated in the said district, notwithstanding that the domicile of the partners was in another district.

JURY TRIAL.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY OF

HARTFORD V. MOORE ⁴

29. The court of Queen's Bench for Ontario has no jurisdiction to order a verdict given in favour of plaintiff to be

¹ Bombay, 1851 Feb. 18, VII Moore 373.

² Jamaica, 1850 Dec. 10, VII Moore 109.

³ Sudder Dermannee, 1861 Dec. 3, III Law Times N. S. 603.

⁴ S. C. Ontario, 1881 July 7, L. R. VI Appeal Cases 644.

JURY TRIAL

set aside, and the same to be entered for the defendant in direct opposition to the finding of the jury upon a material issue.

30. The Supreme court of Canada has the power to order a new trial, whenever the court whose decision is appealed against ought to have granted one.

OF COURTS OF JUSTICE.**THE ATTORNEY GENERAL OF THE ISLE OF MAN V. COWLEY ¹**

31. Where a court lawfully possesses a jurisdiction or useful powers for the administration of justice, mere non-user does not take them away. See INTERNATIONAL LAW : *iusdem verbis*.

THE ST. ANDREW AND QUEBEC RAILWAY CO. V. BROOKFIELD ²

32. Where upon the determination of a contract, it is admitted or established that one of the parties has in his hands a balance of the price of the contract, this is sufficient to give jurisdiction, to a court of Equity and when once this ground is obtained, that court has power to direct an account and to deal with the suit.

OVER PRIVATE ASSOCIATIONS. See ASSOCIATIONS : *iusdem verbis*.

OF VICE-ADMIRALTY COURTS.**PHILLIPS V. THE HIGHLAND RAILWAY CO. THE "FERRET" ³**

33. Under the Merchant Shipping Act, sect. 189, it is lawful for seamen to join in an action before the Vice-Admiralty courts, to recover their wages; and they may also join to obtain compensation for wrongful dismissal.

SPECIAL STATUTORY TRIBUNALS.**MAYOR AND COUNCILLORS OF THE BOROUGH OF PIETERMARISBURG V. NATAL LAND AND COLONIZATION COMPANY ⁴**

34. When a special tribunal of arbitration has been created by a statute to adjudicate on liquidation in equity with regard to expropriations and municipal matters, the jurisdiction of the ordinary courts of justice is taken away, and recourse must be had to this special court. See CORPORATION (MUNICIPAL) : *right to close street*.

¹ Isle of Man, 1859 June 30, XII Moore 27.

² New Brunswick, 1860 Nov. 28, XIII Moore 510.

³ V.-A., 1883 March 7, XLVIII Law Times N. S. 915.

⁴ Natal, 1888 March 10, L. R. XIII Appeal Cases.

STAMP ON DOCUMENTSALLEN V. PULLAY ¹

35. When the law enacts that no document shall be received in evidence unless it be duly stamped and the stamp cancelled, and that when it is not stamped, it may be allowed to be stamped by adding a certain penalty, it was held that where an instrument requiring a stamp which is tendered in evidence has been stamped, but the stamp is not cancelled as required by law, the court has jurisdiction upon payment of the prescribed penalty, to admit it in evidence.

SUPREME COURT OF GIBRALTAR.LARIOS V. BONANY GURETY ²

36. The Supreme court at Gibraltar being a court of law and equity has jurisdiction, in an action in equity for the specific performance of a mere agreement to advance money, to permit the proceedings to be amended as in an action at law, so as to allow damages.

SUPREME COURT OF BOMBAY.SPOONER V. JUDDOW ³

37. In East India, the "quit-rent" formed part of the government's revenue, and the Supreme Court has no jurisdiction in any matter concerning revenue. A plea of "not guilty" was sufficient. Where there is no jurisdiction, a plea in abatement must refer to the proper court, but it is not necessary in a plea in bar.

ARDASCHER CURSETJEE V. PEROZEBOYE ⁴

38. An action in restitution of conjugal rights is strictly an ecclesiastical proceeding, and cannot, according to the principles and rules of ecclesiastical law, be applied to parties who profess the Parsee religion, in Bombay.

JURY

See CRIMINAL LAW: *eodem verbo*.

JURY TRIAL

See CRIMINAL LAW, EVIDENCE, JURISDICTION, PRACTICE.

¹ Straits Settlement, 1882 Jan, 24, XLVI Law Times N. S. 435.

² Gibraltar, 1873 May 3, L. R. V P. C. 346.

³ Bombay, 1850 Feb. 14, VI Moore 257.

⁴ Bombay, 1856 April 13, X Moore 375.

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LAW OF LOWER CANADA

LAW AND EQUITY.

MUIR V. MUIR ¹

1. The law of the Province of Quebec does not recognize the distinction between law and equity as it is admitted in England.

SIR JAMES COLVILLE, p. 84:—This law does not recognize the distinction between law and equity which obtains here. It has now been reduced to a code.....

And their Lordships cannot see that, by any other article of this code, or otherwise, the courts in Canada have power upon some supposed ground of equity to engraft an exception upon the exception established by the second article (Civil Code).

See CODES OF LAW : *construction of Canadian*

LAWYER

See ATTORNEY.

LAW SUITS

See CHAMPERTY AND MAINTENANCE.

LEGACY

CAPACITY OF THE LEGATEE.

KING V. TUNSTALL ²

2. By the conjoint operation of the Imperial Act 14 Geo. III, c. 83, and of the Canadian Act 41 Geo. III, c. 4, the general incapacity to receive on the part of donees or legatees, such as adulterine bastards, was removed.

3. The said Canadian Act was only a declaratory Act as applied to the Imperial Act.

4. Thus, an adulterine bastard to whom a gift was made by substitution before the passing of the said Act will be, as substitute, entitled to receive the substitution opened in his favour after the passing of the Act.

THE LORD JUSTICE JAMES, p. 91:—Their Lordships have listened with great attention and interest—I think I may add with great instruction—to the very able arguments which have been addressed to them by both the learned counsel in support of the appellant's case. Their Lordships will assume, for the purpose of disposing of this appeal, that the law was exactly as stated by the learned counsel—that is to say, that according to the law stated in the *Coutume de Paris*, which was transplanted, or rather planted, in Canada by

¹ Quebec, 1873 Dec. 9, L. R. V P. C. 84.

² Quebec, 1874 July 21, L. R. VI P. C. 55.

CAPACITY OF THE LEGATEE

royal authority as the law of Canada under the French dominion, the gift in question to Plenderleath would be an absolutely null and void gift, by reason of the doctrines of the law established with respect to adulterine bastardy. They will assume that it was proved in point of fact that Plenderleath was an adulterine bastard, that he was incapable, under the old law, of receiving such a gift as this—that is to say, a gift by way of substitution of the family estates, as to which it could not well be predicated that they were given by way of sustentation or *alimens*. Their Lordships assume, further, that the doctrine of prescription would not apply to a case of this kind; but although they assume this, probably if it were necessary for the determination of the case, they would have required further argument and further consideration as to whether open possession under an instrument of this kind held during the whole of the lifetime, and afterwards for a great many years by the successor of the person who had so held, would not be brought within the description of a *juste titre* where the objection was simply taken upon the ground of a doubtful construction of an instrument or the doubtful construction of an Act or Acts of the legislature. They assume, however, that the doctrine of prescription would not apply to this case.

Then the matter resolves itself really into that upon which the Courts in Canada decided upon more than one occasion, and after a great lapse of years, as to what was the conjoint operation of the English Act and the Canadian Act, and of the provision of the Canadian law which is embodied in the Code, as to the period at which the capacity of a substitute is to be ascertained.

Now at the time when the English Act was passed, it is clear that in the settlement of Lower Canada the sovereign legislature thought fit to establish the old Canadian law, with several notable exceptions. One notable exception, to which our attention was called very late in the argument, was this: that no part of the old Canadian law would apply to lands given in common socage, from which it would follow, apparently, that with regard to lands in common socage they were perfectly within the power of the owner, whether by a gift *inter vivos* or by a testamentary disposition, to give, dispose, and sell in any way to any person whatever, without any restriction whatsoever arising from the character of the individual. It would be singular that there should be one law, based upon the grounds of public morality and public policy, which would make a gift of anything but lands in common socage void, but which would make gifts of lands held in common socage perfectly good. It would be difficult to conceive how there could be any principle of public morality, public decency, or public policy, or position of one class of property void upon those grounds, and not void as to another class of property. But beyond that, the legislature proceeded to give unlimited power of testamentary disposition, the law of England having from the earliest period—from the period when testamentary dispositions were introduced—given absolute power to a testator to deal as he liked with his property. The English legislature introduced that law into Lower Canada; and it is not immaterial to observe, as was pointed out by Mr. Justice Badgley, in an

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argument which has been attacked on various grounds for inaccuracy—a very able and very learned argument—in the old Coutume as to testamentary power, the testamentary power to the extent to which it then existed is expressed to be a testamentary power which could be exercised in favour of *des personnes capables*—those are the words. When the English legislature came to deal with it, these words were left out—their Lordships do not say they were expressly omitted, but they were omitted, so that the omission is a matter that deserves observation and consideration. Therefore it stands that the testator, the owner of property, is given unlimited and unqualified testamentary power, so far as he is concerned.

But then a question arises, or might have arisen, as to whether that removed any testamentary incapacity on the part of the donee or legatee, the incapacity of taking; and here their Lordships think there was a fallacy in the arguments addressed to them. It is said that the incapacity was an incapacity of the testator; that it was the testator who was prevented from doing it, or was intended to be deterred from making a disposition in favour of his adulterine bastard, through the adulterine bastard, by making the pains and penalties fall upon the head of the innocent adulterine bastard; that therefore it was that the testator's capacity to give was aimed at, and not the capacity of the donee, the object of the bounty, to take. If that were clearly made out to be so, then it appears to their Lordships that the first Act did everything that was necessary. If there was only the capacity of the testator to be dealt with, the first Act had given unlimited and unqualified capacity to the testator to deal with it. But of course beyond that, the old law had said it should not be lawful for the testator to give, but had gone on in terms frequently repeated—it should not be competent for the offspring of the adulterous intercourse to take. Indeed they were declared to be the issue of a *damnatus coitus*, and various strong expressions of that kind, from which it might be inferred, and probably was declared, that not only the testator was prohibited from giving, but that they were prohibited from receiving. Hence, when the English statute came, which might well have been thought to have removed all difficulties whatsoever, doubts and difficulties did arise—I do not say in this particular case—but doubts and difficulties did arise as to whether not only the capacity of the testator had been restored, but whether the incapacity of a donee to receive had been removed. It seems to have been held in a particular case that the incapacity of a donee to receive had not been removed, an incapacity arising from a special principle of law—that is to say, the incapacity of the guardian to receive from a pupil or ward a gift by a testamentary instrument, which of course was a thing depending upon the guardian, the object of it being not to punish or inflict any disability upon the pupil, but to prevent a guardian from abusing the influence which he had in obtaining the gift. Therefore that gift, and all other classes of gifts based upon a similar principle—that is to say, based upon the necessity of preventing the undue exercise of the influence which particular persons had who stood in a particular relation to other persons—that kind of incapa-

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city could not have been within the intention of the English legislature, which simply removed a testamentary incapacity—the incapacity of making a testament. Then the Canadian legislature, having before it the English law, passed a law which professed to be a law to explain as well as to amend the old law; and it proceeds to recite that doubts and difficulties had arisen with respect to it; and then it does not proceed to say that there is any necessity for amending, but that doubts and difficulties had arisen with respect to the English Act of Parliament—that English Act of Parliament being an Act of Parliament which it was perfectly within the competency of the Canadian legislature to deal with as they thought fit, being a mere matter of disposition of property in the colony, not affecting any imperial policy. Having those doubts and difficulties before them they passed an Act to say they desired to explain and amend. They recite the difficulties, and then they go on to say, in terms of futurity (because it has been very much pressed upon us as affecting this question), that it shall be lawful for a testator to give to any person or persons whomsoever; that it shall be lawful for them to give, with an exception that the Act so declared and provided that it should not extend to gifts in mortmain, the exception being, in the opinion of their Lordships, of the greatest possible importance in the determination of this question. The only thing that is excepted is a gift in mortmain; therefore leaving it unqualified, in every other respect, it was to be absolutely to any person or persons whomsoever, which in truth applied to a case to which *prima facie* it might have seemed difficult to have said that it ought to have applied, that is to say, to a gift obtained by a person in a position to exercise undue influence over another person. Then the words no doubt are words of futurity; but in the Canadian courts, first of all in a suit which was brought, I think, as far back as the year 1834, the person who then brought it being capable of having instituted the suit as far back as 1799, it was held by the judges of first instance that the Canadian Act had the effect which is suggested on the part of the respondent. It was afterwards held by the court of Appeal in that case that it had that effect. It is true that in that particular case the court of Appeal reversed the judgment of the court below upon a technical ground—that is to say, they said you ought not to have given a judgment at all, because the then plaintiffs had not made out any character to sue, although they had had the very character in respect to which the present suit is brought; but they had not so pleaded and so proved it as to render it possible, according to the view of the Supreme court, for the court of Appeal then to have come to a final decision. They said it was a suit between persons who had not established in themselves any *locus standi* to have a decision at all; but still the original court there have decided the case upon the merits, and have taken that view of the legislature which is now before us.

Well, then, the court of Appeal in that case, although they remitted it back upon the technical ground which I have mentioned, took great care to give an elaborate judgment themselves, in which they adopted exactly the same view, and that was a great many

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years ago. In the present case, the court of first instance takes the same view, the court of Appeal by a majority takes the same view and that has been the law, apparently understood in Canada from the time when the matter was first mooted in this particular case, but which has been more or less mooted now during the greater part of this century, and it would appear to be the view of the law which the commissioners took when they framed their Code, leaving the law so to stand on the two Acts of Parliament, but preserving or re-enacting the law with regard to gifts *inter vivos*.

Then, as it appears to their Lordships, there is great ground for taking that view as to the effect of the Canadian law. It really would seem to be very difficult indeed to conceive that there can be two different systems of policy applicable to testamentary dispositions—one as to instruments dated after 1801, and the other as to instruments dated before 1801; but their Lordships feel that whatever doubt they might have had with respect to the beginning of it, they are very much governed by that which has been the concurrent decision of the courts in Canada during the lapse of so many years. No doubt a difficulty arises from the general principle of law, that you never construe an Act of Parliament or of the legislature to be retroactive or retrospective, unless it is clearly made so, unless you are compelled by express language so to do. That difficulty, it appears to their Lordships, is entirely removed in this case by the peculiar provisions of the old law derived from the Roman law, the peculiar provisions of the French law, which have been incorporated into and now form part of the Canadian Code, which is, that wherever there is a limitation by way of substitution, the time when the substitution opens is the time at which the capacity of the substitute to take is to be determined. It is difficult to say to what class of cases that would apply if not to this. If a person at the time of the will was not capable of taking, or was incapacitated from taking—if a person was at the time of the death incapacitated from taking, how and when and under what circumstances is that provision of the Code to apply which says that the question is to be tried and to be determined at the moment when the substitution opens? It is suggested indeed that that was put in with regard to the question that a person might not be in existence at the date of the will or at the death, and that it applied to that. There is no such limitation expressed in the Code, and I think it was conceded, and fairly conceded, that if the incapacity were clearly a personal matter of incapacity on the part of an individual for instance—a gift to a felon, to a person who was *civilitur mortuus*, a gift to a person who was an alien, or to a person who was under any peculiar personal incapacity of that kind—it was conceded that in that case, if the incapacity were removed before the substitution opened, that then the question would have to be determined at that moment, and that it would not suffice to say that at the date of the will, at the time of the death, you were an incapacitated person, and that incapacity therefore never could be removed afterwards. In the judgment in the original case to which I have referred, a great number of authorities were cited, and there is a passage from Ricard in which it is thus stated:

CAPACITY OF THE LEGATEE

"Quant aux dispositions conditionnelles lorsque la condition s'étend au-delà du décès du testateur, le droit romain n'exigeait la capacité du donataire qu'au temps de l'accomplissement de la condition, parce que c'est à cette époque que le droit est ouvert et que le testateur est censé avoir prévu que le donataire pouvait devenir capable avant l'événement de la condition. C'est comme s'il avait dit, je donne à Titius, s'il est capable de recevoir lorsque telle condition arrivera."

It would be difficult to say that that would not apply to this case, the case of an Englishman who in his testamentary capacity gives to his natural child, but says: "I give it to him if he is capable of receiving it with a substitution over." Further, the matter is very fully discussed in the quotation, but it is not necessary to read it at great length. Indeed, it was said that it is not to be applied in that way; that the thing itself was such a wicked violation of the law on the part of a testator, that the attempt to give is so bad that it was to be struck at more strongly than anything else—that it was a violation of the law at the beginning, just as if it were a gift to a person inducing him to commit a crime. Their Lordships are unable to take that view of it. No doubt it was illegal and illicit; it was inoperative and ineffective, just as in this country it is perfectly illicit for a man to give his real property or his chattels real for the foundation of the most useful charity in the world. But nobody supposes that it is a crime in a man to express by his will the use to which this property should be so given. It would be very difficult indeed to suppose that it ever could be a crime in a testator, who is merely expressing his wishes as to what should be the devolution of his property after his death, to wish that his property should go in a particular direction, even although that direction should be in favour of the illegitimate or adulterine bastard—that it is a crime in him to wish it, leaving it open to the law to say that the wish shall not take effect if that be the view of the law. It is impossible to deal with it on that ground. It could only be void so far as it was inoperative and ineffective. Therefore it was a gift under a will to a person who at the time when the substitution opened was relieved from all incapacity by the intervening Canadian legislation; and their Lordships therefore, on the whole, are of opinion that the decisions of the Canadian courts ought not to be disturbed; and they will humbly recommend to Her Majesty that the appeal be dismissed, with costs.

CONSTRUCTION OF CHARITABLE

MAYOR OF LYON V. ADVOCATE GENERAL OF BENGAL¹

5. The principles on which the *cy-près* doctrine rests appear to be, that the court will treat a charitable legacy in the abstract as the substance of the gift, and the particular disposition how to apply it as the mode, so that in the eye of the court the gift, notwithstanding the particular disposition may not be capable of execution, subsists as a legacy

¹ Bengal, 1875 Feb. 5, L. R. I Appeal Cases 91.

CONSTRUCTION OF CHARITABLE

which never fails and cannot lapse. *Mills v. Farmer*, 19 Ves. 486; *Moggridge v. Thackwell*, 7 Ves. 36.

6. When a testator had left a sum of money to liberate poor prisoners for debt, and, subsequently, imprisonment for debt was abolished, the court applied the money in aid of a college in the same place.

PRIVILEGE OF A PARTICULAR LEGATEE.

SMITH V. BROWN ¹

7. A particular legatee has no claim by privilege or hypothec against the private estate of the sole testamentary executor and residuary legatee, prior to the creditors of the latter.

TO A CORPORATION NOT YET IN EXISTENCE. See WILL: *iusdem verbis*.

TO ADULTERINE BASTARD. See LEGACY: *capacity of legatee*, WILL: *iusdem verbis*.

TO TUTORS AND GUARDIANS. See TUTORSHIP: *legacy from ward*.

LEGISLATURE**COLONIAL LEGISLATURE.**

POWELL V. APOLLO CANDLE COMPANY ²

8. The 133rd section of the Customs Regulation Act of 1879 of New South Wales, which imposes a duty upon an article unknown to the Collector, and which in the opinion of the Collector is apparently a substitute for any known dutiable article, is not *ultra vires* and is constitutional. *Reg. v. Burals*, 3 App. Cas. 889; *Hodge v. The Queen*, 9 App. Cases 117

SIR ROBERT P. COLLIER, p. 290:—These two cases have put an end to a doctrine which appears at one time to have had some currency, that a colonial legislature is a delegate of the Imperial legislature. It is a legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate.

DISQUALIFICATION OF MEMBERS.

MILES V. McILWRAITH ³

9. A rule of the legislative assembly of Queensland prohibits any of the members, under pain of disqualification and certain penalties, from entering into any contract with the government whereby pecuniary interest may be derived.

10. The agents of one of the members of the assembly, in contravention of their principal's orders, made with the government a contract to carry emigrants in a ship in which

¹ Lower Canada, 1837 July. 7, II Moore 35.

² New South Wales, 1885 Feb. 13, L. R. X Appeal Cases 282.

³ Queensland, 1883 Feb. 27, L. R. VIII Appeal Cases 120

DISQUALIFICATION OF MEMBERS.

the member had a share, the agents not disclosing their principal, and the government being ignorant of the fact that a share of the ship belonged to one of the members of the legislative assembly, and that they were contracting with his agents. Under such circumstances, the Judicial Committee held that the member was not disqualified.

LEGISLATIVE POWERS.*Benevolent societies.***L'UNION ST. JACQUES DE MONTREAL V. BÉLISLE¹**

11. The 92nd section of the Constitutional Act of the Dominion of Canada, in the distribution of legislative powers, assigned to the exclusive power and competency of the provincial legislature: "*Generally all matters of a merely local or private nature in the province.*" Under this section, an Act of the provincial legislature of Quebec which purported to relieve by legislation a benevolent society, appearing to have been in a state of extreme financial embarrassment, is perfectly constitutional and within the capacity of the provincial legislature.

12. Such legislation must be considered as being of a private character and not falling under the category of bankruptcy and insolvency reserved to the federal parliament.

LORD SELBORNE, p. 933:—The sole question in this appeal is this, whether the subject matter of the Provincial Act (33 Vict., c. 58), is one of those which by the 91st section of the Dominion Act are reserved exclusively for legislation. The scheme of the 91st and 92nd sections is this. By the 91st section some matters—and their Lordships may do well to assume, for the argument's sake, that they are all matters except these afterwards dealt with by the 92nd section—their Lordships do not decide it, but for the argument's sake they will assume it; certain matters, being upon that assumption all those which are not mentioned in the 92nd section, are reserved for the exclusive legislation of the Parliament of Canada, called the Dominion Parliament; but beyond controversy there are certain other matters, not only reserved for the Dominion Parliament, but assigned to the exclusive power and competency of the Provincial Legislature in each province. Among those the last is thus expressed: "*Generally all matters of a merely local or private nature in the province.*" If there is nothing to control that in the 91st section, it would seem manifest that the subject matter of this Act, the 33 Vict., c. 58, is a matter of a merely local or private nature in the province, because it relates to a benevolent or benefit society incorporated in the city of Montreal within the province,

¹ Quebec, 1874 July 8, Weekly Reporter 933.

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which appears to consist exclusively of members who would be subject *prima facie* to the control of the Provincial Legislature. This Act deals solely with the affairs of that particular society, and in this manner:—taking notice of a certain state of embarrassment resulting from what it describes in substance as improvident regulations of the society, it imposes a forced commutation of their existing rights upon two widows, who at the time when that Act was passed were annuitants of the society under its rules, reserving to them the rights so cut down in the future possible event of the improvement up to a certain point of the affairs of the association. Clearly this matter is private; clearly it is in the province and in the city of Montreal; and unless, therefore, the general effect of that head of sect. 92 is for this purpose qualified by something in sect. 91, it is a matter not only within the competency, but within the exclusive competency of the provincial legislature. Now sect. 91 qualifies it undoubtedly, if it be within any one of the different classes of subjects there specially enumerated in this section shall not be deemed to come within the class of matters because the last and concluding words of sect. 91 are: "And any matter coming within any of the classes of subjects enumerated of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislature of the province." But the *onus* is on the respondent to show that this, being of itself of a local or private nature, does also come within one or more of the classes of subjects specially enumerated in the 91st section.

Now it has not been alleged that it comes within any other class of the subjects so enumerated except the 21st, "Bankruptcy and Insolvency;" and the question therefore is, whether this is a matter coming under that class 21, of bankruptcy and insolvency? Their Lordships observe that the scheme of enumeration in that section is, to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any instance of anything being contemplated, except what may be properly described as general legislation; such legislation as is well expressed by Mr. Justice Caron when he speaks of the general laws governing *Faillite* bankruptcy and insolvency all which are well known legal terms expressing systems of legislation with which the subjects of this country, and probably of most other civilized countries, are perfectly familiar. The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation. Well, no such general law covering this particular association is alleged ever to have been passed by the Dominion. The hypothesis was suggested in argument by Mr. Benjamin, who certainly argued this case with his usual ingenuity and force, of a law having been previously passed by the Dominion Legislature, to the effect that any association of this particular kind throughout the Dominion, on certain specified conditions assumed to be exactly those which appear

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upon the face of the statute, should thereupon, *ipso facto*, fall under the legal administration in bankruptcy or insolvency. Their Lordships are by no means prepared to say that if any such law as that had been passed it would have been beyond their competency; nor that, if it had been so passed, it would have been within the competency of the Provincial Legislature afterwards to take a particular association out of the scope of a general law of that kind, so competently passed by the authority which had power to deal with bankruptcy and insolvency. But no such law ever has been passed, and to suggest the possibility of such a law as a reason why the power of the Provincial Legislature over this local and private association should be in abeyance or altogether taken away, is to make a suggestion which, if followed up to its consequences, would go very far to destroy that power in all cases.

It was suggested, perhaps not very accurately, in the course of the argument, that upon the same principle no part of the land in the province upon the sea coasts could be dealt with, because, by possibility, it might be required for a lighthouse, and an Act might be passed by the Dominion Legislature to make a lighthouse there. That was not a happy illustration, because the whole of the sea coast is put within the exclusive cognizance of the Dominion Legislature by another article; but the principle of the illustration may be transferred to Article 7, which gives to the Dominion the exclusive right of legislating as to all matters coming under the head of "militia, military and naval service, and defence." Any part of the land in the Province of Quebec might be taken by the Dominion Legislature for the purpose of military defence; and the argument is, if pushed to its consequences, that, because this which has not been done as to some particular land might possibly have been done, therefore, it not having been done all power over that land, therefore over all the land in the province, is taken away, so far as relates to legislation concerning matters of a merely local or private nature. That their Lordships think, is neither a necessary or reasonable, nor a just and proper construction. The fact that this particular society appears upon the face of the Provincial Act to have been in a state of embarrassment, and in such a financial condition that, unless relieved by legislation, it might have been likely to come to ruin, does not prove that it was in any legal sense within the category of insolvency. And in point of fact the whole tendency of the Act is to keep it out of that category, and not to bring it into it. The Act does not terminate the company; it does not propose a final distribution of its assets on the footing of insolvency or bankruptcy; it does not wind it up. On the contrary, it contemplates its going on, and possibly at some future time recovering its prosperity, and then these creditors, who seem on the face of the Act to be somewhat summarily interfered with, are to be re-instated.

Their Lordships are clearly of opinion that this is not an Act relating to bankruptcy and insolvency, and will, therefore, humbly advise Her Majesty that this appeal be allowed, that the judgment

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of the Court of Queen's Bench ought to be reversed, and that the suit be dismissed. There will be no costs of this appeal.

*Taxation.*DOW ET AL V. BLACK¹

13. An Act of the provincial legislature of New Brunswick which empowered the majority of the inhabitants of the parish of St. Stephen to raise by local taxation a subsidy, designed to promote the construction of a railway extending beyond the limits of the province, but already authorized by statute passed before the Confederation, is within the legislative capacity of that legislature. *L'Union St. Jacques de Montréal v. Bélisle*, approved.

Stamp on insurance policies.

ANGERS, ATTORNEY GENERAL OF QUEBEC

V. QUEEN INSURANCE COMPANY²

14. An Act of parliament requiring each policy issued by insurance companies to bear a stamp of a value determined by the nature of the risk and the amount of the policy, payable by the person dealing with the company, is not a license Act, but a stamp Act; and does not fall within the powers granted to a provincial legislature by the *British North America Act*, 1867, sect. 92, sub sect. 9 to grant licenses, in order to raise revenue for provincial purposes.

SIR G. JESSEL p. 1096 :—The judgment appealed against was unanimous on one of the two points to which the appeal relates, and was decided by four Judges against one on the other. The real decision was that the clauses of a statute of the Province of Quebec, 39th of the Queen, chap. 7, which imposed a tax upon certain policies of assurance, and certain receipts or renewals were not authorised by the Union Act of Canada, Nova Scotia and New Brunswick, which entrusted the Province, or the Legislature of that Province, with certain powers conferred by the 92nd section of the Act in question, are sufficient to authorise the statute which is under consideration.

It is not absolutely necessary to decide in this case how far, if at all the express enactments of the 92nd section of the Act are controlled by the provisions of the 91st section, because it may well be that, so far as regards the two provisions which their Lordships have to consider, namely, the subsections 2 and 9 of the 92nd section, those powers may co-exist with the powers conferred on the Legislature of the Dominion by the 91st section. Assuming that to be so, the question is: whether what has been done is authorised by those powers?

The first power to be considered, though not the first in order in

¹ New Brunswick, 1875 March 5, L. R. VI P. C. 272.

² Quebec, 1878 July 5, L. R. III Appeal Cases 1090.

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the Act of Parliament, is the 9th sub-section. The Legislature of the Province may exclusively make laws in relation to "shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes." The statute in question purports to be, on the face of it, an exercise of that power. It enacts that every assurer, except people carrying on marine insurance, shall be bound to take out a license before the 1st day of May in each year, from the revenue officer of the district, and to remain continually under license. It then, by the second section, enacts what the price of the license is to be. And reading it shortly, it amounts to this: that the price of the license shall consist of a stamp affixed to the policy or receipt or renewal as the case may be. The adhesive stamp is to be, in the case of fire, 3 per cent., and 1 per cent for other assurances on the premiums paid. Then the fourth section enacts that anybody, who, on behalf of an assurer, shall deliver any policy or renewal or receipt without the stamp shall be liable for each contravention to a penalty of fifty dollars. The fifth section says that every assurer bound to take out a license shall be liable in each case to a penalty not exceeding fifty dollars if it has been delivered without an adhesive stamp. The sixth section says that every person who affixes the stamp shall be bound to cancel it so as to obliterate it, and prevent its being used again. And the seventh makes all policies, premium receipts or renewals, not stamped as required by the Act, invalid. It says they "shall not be invoked, and shall have no effect in law or in equity before the courts of this Province." Then there are certain sections of the Quebec License Act which are incorporated, and the Act is not to apply to assurances not within the Province. The only provision of the Quebec License Act which it is necessary to refer to is the 12th: "For every license issued "by a revenue officer, there shall be paid "to such revenue officer, over and above the duty payable therefor, "a fee of one dollar by the person to whom it is issued."

Now, the first point which strikes their Lordships, and will strike every one, as regards this Licensing Act, is that it is a complete novelty. No such Licensing Act has ever been seen before. It purports to be a Licensing Act, but the licensee is not compelled to pay anything for the license, and, what is more singular, is not compelled to take out the license, because there is no penalty at all upon the licensee for not taking it up; and, further than that, if the policies are issued with the stamp, they appear to be valid, although no license has been taken out at all. The result, therefore, is, that a license is granted which there are no means of compelling the licensee to take, and which he pays nothing for if he does take; which is certainly a singular thing to be stated of a license. They say on the face of the statute, "The price of each license shall consist," and so on. But it is not a price to be paid by the licensee. It is a price to be paid by anybody who wants a policy, because, without that, no policy can be obtained. It may be that the company buys the adhesive stamps, and affixes them, or pays an officer of the company the money necessary to purchase them and affix them; but whoever does it complies with the Act.

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Another observation which may be made upon the Act is this: that if you leave out the clauses about the license, the effect of the Act remains the same. It is really nothing more nor less than a Stamp Act if you leave out those clauses. If you leave out every direction for taking out a license, and everything said about the price of a license, and merely leave the rest of the Act in, the government of the Province of Quebec obtains exactly the same amount by virtue of the statute as it does with the license clauses remaining in the statute. The penalty is on the issuing of the policy, receipt or renewal; it is not a penalty for not taking out the license. The result, therefore, is this, that it is not in substance a license Act at all. It is nothing more or less than a simple Stamp Act on policies, with provisions referring to a license because, it must be presumed, the framers of the statute thought it was necessary, in order to cover the kind of tax in question with legal sanction, that it should be made in the shape of the price paid for a license.

If that is so, it is of no use considering how far, independently of these considerations, the 9th sub-section of the 92nd section would authorise a sum of money to be taken from an assurance company in respect of a license. With regard to the precedents cited, it was alleged, on behalf of the appellants, that though at first sight it might appear that this was not a license, and that this was not the price paid for a licence, yet it could be shown by the existing legislation in England and America that licenses were constantly granted on similar terms; and that therefore in construing the Dominion Act we ought to construe it with reference to the other subsisting legislation. Their Lordships think that a very fair argument. But the question is, is it true in fact? When the instances which were produced were examined, it was found that they were of a totally different character. They might be described as licenses granted to traders on payment of a sum of money; but the price to be paid by the trader was estimated either according to the amount of business done by the trader in the year previous to the granting of the license, or with reference to the value of the house in which the trader carried on business, or with reference to the nature of the goods, as regards quantity especially, sold by the trader in the previous year. They were all cases in which the price actually paid by the trader for the license at the time of granting it, was ascertained by these considerations. It was a license paid for by the trader, and the actual price of the license was ascertained by the amount of trade he did. This is not a payment depending in that sense on the amount of trade previously done by the trader. It is a payment on the very transactions occurring in the year for which the license is taken out and is not really a price paid for a license, but as has been said before, a mere stamp on the policy, renewal or receipt.

As this is the result to which their Lordships come, it becomes necessary to consider the effect of the 2nd sub-section of the 92nd section. That authorizes "direct taxation within the Province in order to the raising of a revenue for provincial purposes." The single point to be decided upon is whether a Stamp Act—an Act imposing a stamp on policies, renewals and receipts, with provision

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for avoiding the policy, renewal or receipt, in a court of law, if the stamp is not affixed—is or is not direct taxation? Now, here again we find words used which have either a technical meaning, or a general, or, as it is sometimes called, a popular meaning. One or other meaning the words must have; and, in trying to find out their meaning, we must have recourse to the usual sources of information whether regarded as technical words, words of art, or words used in popular language. And that has been the course pursued by the court below. First of all, what is the meaning of the words as words of art? We may consider their meaning either as words used in the sense of political economy, or as words used in jurisprudence in the courts of law. Taken in either way there is a multitude of authorities to show that such a stamp imposed by the Legislature is not direct taxation. The political economists are all agreed. There is not a single instance produced on the other side. The number of instances cited by Mr. Justice Taschereau, in his elaborate judgment, it is not necessary here to more than refer to. But surely if one could have been found in favor of the appellants, it was the duty of the appellants, to call their Lordships' attention to it. No such case has been found. Their Lordships, therefore, think that they are warranted in assuming that no such case exists. As regards judicial interpretation there are some English decisions, and several American decisions, on the subject, many of which are referred to in the judgment of Mr. Justice Taschereau. There, again, they are all one way. They all treat stamps either as indirect taxation or as not being direct taxation. Again, no authority on the other side has been cited on the part of the appellant.

Lastly, as regards the popular use of the words, two cyclopedias at least have been produced, showing that the popular use of the word is entirely the same in this respect as the technical use of the word. And, here again, there is an utter deficiency on the part of the appellants in producing a single instance to the contrary. That being so, it is not necessary, it appears to their Lordships, for them to consider the scientific definition of direct or indirect taxation. All that it is necessary for them to say is, that finding these words in an Act of Parliament, and finding that all the then known definitions, whether technical or general, would exclude this kind of taxation from the category of direct taxation, they must consider it was not the intention of the legislature of England to include it in the term of direct taxation, and therefore that the imposition of the stamp duty is not warranted by the terms of the 2nd sub-section of section 92 of the Dominion Act. That being so, it appears to their Lordships that the appeal fails, and they will, therefore, humbly advise Her Majesty to affirm the decision of the court below and dismiss the appeal.

BOURGOIN V. LA CIE DE MONTREAL, OTTAWA ET OCCIDENTAL ¹

*Corporations.***15. A corporation created by the federal parliament can-**

¹ Quebec, 1880 Feb. 26, L. R. V Appeal Cases 381.

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not be dissolved and its property transferred to another corporation by an Act of the provincial parliament.

SIR JAMES W. COLVILLE, p. 402 :—The combined effect, therefore, of the deed and of this statute, if the transaction was valid, was to transfer a federal railway, with all its appurtenances, and all the property, liabilities, rights, and powers of the existing company, to the Quebec government, and, through it, to a company with a new title and a different organization; to dissolve the old federal company, and to substitute for it one which was to be governed by, and subject to, provincial legislation.

It is contended on the part of the appellants that this transaction was invalid, and altogether inoperative to affect the obligations of the company. They insist that, by the general law and by reason of the special legislation which governed it, the company was incompetent thus to dissolve itself, to abandon its undertaking, and to transfer that, and its own property, liabilities, powers, and rights to another body, without the sanction of an Act of a competent legislature; and, further, that the legislature of Quebec was incompetent to give such sanction. This contention appears to their Lordships to be well founded.

That such a transfer, except under the authority of an Act of Parliament, would in this country be held to be *ultra vires* of a railway company, appears from the judgment of Lord Cairns in *re Gardner v. London, Dover, and Chatham Railway Company*, 2 *Chancery Appeals*, 201 and 212. That it is equally repugnant to the law of the Province of Quebec, so far as that is to be gathered from the civil code, is shown by the 369th article of that code. But the strongest ground in favour of the appellants' contention is to be found in the special legislation touching this railway company. The history of the company and of its conversion from a provincial into a federal railway company has been stated in the judgment already delivered. By section 1 of the Canadian Statute, 36 Vict., c. 82, which effected that conversion, the railway was declared to be a work for the general advantage of Canada. By the 5th section of the same statute, it was enacted that the continuation of the line thereby authorized should be deemed to be railways or a railway to be constructed under the authority of a special Act passed by the Parliament of Canada, and that the company should be deemed to be a company incorporated for the construction and working of such railways and railway, according to the true intent and meaning of "The Railway Act, 1868" (The Dominion Statute). By the 6th section, parts 1st and 2nd of "The Railway Act, 1868" (which comprise all the general and material provisions of that statute,) were made applicable to the whole line of the railway, whether within or beyond the enterprise originally contemplated; and it was enacted that no part of "The Quebec Railway Act, 1869," should apply to the said railway, or any part thereof, or to the said company. And by the 7th section it was provided that the two Acts of the Quebec Legislature (32 Vict., c. 35, and 34 Vict., c. 28,) by which the company had been incorporated and previously governed, should be

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read and construed and have effect as if the changes of expression therein mentioned (the effect of which would be to make them speak as Acts of the Canadian Parliament) had been made in them; that so read and construed and taking effect, they should be deemed to be special Acts according to the true intent and meaning of "The Railway Act, 1868," and that no part of "The Quebec Railway Act, 1869," should be incorporated with the said special Acts, or either of them, or form part thereof, or be construed therewith as forming one Act.

These provisions, taken in connection with, and read by the light of those of the Imperial Statute, "the British North American Act, 1867," which are contained in section 91, and sub-section 10c of section 92, establish to their Lordships' satisfaction, that the transaction between the company and the government of Quebec could not be validated to all intents and purposes by an Act of the provincial legislature, but that an Act of the parliament of Canada was essential in order to give it full force and effect. This proposition was, finally, hardly disputed by the learned counsel for the respondent, but they relied upon the 8th clause of the deed, and the 46th section of the Quebec Act, as showing that recourse to the parliament of Canada for its sanction was within the contemplation of the parties, and contended that, before that sanction was obtained, the transaction was valid for some purposes, and gave certain inchoate rights which were capable of being asserted. In support of their argument they cited the *Great Western Railway Company v. The Birmingham and Oxford Junction Railway*, 2 *Phill.* 597, and what was said by Lord Cottenham in that case. It is to be observed, however, that Lord Cottenham, when ruling that the contract, which could not be fully carried out without Parliamentary sanction, was not, in the absence of such sanction, to be treated as a nullity, and that some of its provisions might nevertheless be binding, was dealing with the rights of the parties to the contract *inter se*. Here the public, and the creditors of the company, in which category the appellants fell since the questions raised by these two appeals must be considered as if the award were valid, were no parties to the transaction, and could not be affected by it until it was fully validated by an Act of the Parliament of Canada, to obtain which no attempt seems ever to have been made. In their Lordships' opinion, therefore, the transaction, considered as a whole, was of no force or validity as against the rights of the appellants when the decisions of the Canadian courts upon the intervention and the opposition were passed.

This being their Lordships' conclusion, they proceed to consider how it affects the two appeals, and first that which relates to the Attorney General's intervention. Now, if it be admitted, for the sake of argument, though their Lordships must not be taken to affirm the proposition, that the Attorney General had such an inchoate right under the transaction as would have justified his intervention had there been reason to suppose that the expiring company would fail to make a substantial defence to the action No. 1,213, it is to be observed that that was not the actual state of things. The action itself was not commenced until December 1876, and the de-

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fences of the company were filed on the 30th of that month. The transaction between the company and the Quebec Government was completed, so far as it was ever completed, in December 1875. It is, therefore, obvious that, in the first instance, the Quebec Government intended to defend the action, in the name of the company, under the provisions of the 7th clause of the deed. All objections which the company could take to the award, and in particular the one which has proved fatal to it, were taken in their defences. The intervention of the Attorney General was not until 1878, and the reasons filed by him on the 17th of September in that year are sufficient to show that the object of the intervention was to raise objections to the validity of the award, founded upon the attempted transfer of 1875, which could not have been taken in the name of the company. Those reasons, the contestation of them, and the other pleadings show that the new issues raised between the parties were the validity of the transfer as against the appellants, the right of the commissioners under the Quebec Act to continue or discontinue the proceedings in the expropriation, the abandonment of the railway, and its transformation into a new railway, to be constructed under different conditions. This intervention was only necessary for the trial of these fresh and additional issues; and was, as the court of Queen's Bench itself has found, wholly unnecessary for the trial of the original issues. Upon the trial of the action in the Superior court, Mr. Justice Mackay expressly found "*que les faits allégués dans la dite intervention, savoir le transport des droits et actions de la dite défenderesse au gouvernement de la dite province de Québec, n'a pas été prouvé avoir lieu légalement,*" a finding in accordance with the conclusion to which their Lordships have come touching the transaction of 1875, and one which would justify the dismissal of the intervention, even if the learned judge had taken a view different from that which he did take of the validity of the award. The Attorney General had failed to show any grounds for inflicting upon the appellants the costs of unnecessary and expensive proceedings. In these circumstances, their Lordships are of opinion that the court of Queen's Bench ought to have dismissed the appeal of the Attorney General, and to have affirmed the judgment of the Superior court, in so far as it related to the intervention, with costs.

Their Lordships have now to consider appeal No. 144, which arises out of the "*opposition à fin de distraire,*" That opposition to the execution could not succeed as to such of the lands seized as had belonged to the company, unless it were established that the property in those lands had been changed by the attempted transfer of 1875. Their Lordships are of opinion that there was no such change of property. The transaction, viewed as a whole, and as one single contract, could not, for the reasons above stated, operate as a valid transfer of the lands of the company to the Government of Quebec. Their Lordships feel bound to dissent from two propositions, on one of which the judgment of Mr. Justice Johnson, and on the other of which the judgment of Chief Justice Dorion, in part proceeds. Mr. Justice Johnson ruled that the contestants ought, if they questioned the validity of the transaction of 1875, to have concluded that

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it should be set aside or declared null, and that, by reason of their failure to do so, they must be taken to be bound by it. Chief Justice Dorion expressed an opinion that it was only at the instance of the Government of Canada (the Dominion,) or of an individual who could show that he had a special interest distinct from that of the public, that the transfer could be set aside. These reasons are somewhat contradictory, and their Lordships cannot think that either affords a good ground for the judgment impeached. If the transaction, not having the sanction of the Parliament of Canada, were *ultra vires* of the company and the government and legislature of Quebec, it was of no legal force or validity against the appellants, and might be so treated by them whether it were formally set aside or not. The other ground on which the judgment proceeds, and which has been chiefly insisted upon here is more plausible. It is that the company had power, under the second sub-section of the 7th section of "the Railway Act, 1868," to "alienate, sell, and dispose of its lands"; that the transaction of 1875, even if invalid as a whole, is severable, and that the company must be taken to have sold by it their land to the government of Quebec in the exercise of that power. Their Lordships cannot accede to this argument. It appears to them that the contract is not severable in the manner suggested. It is a contract whereby, for the same consideration, everything which it purported to pass was intended to pass. Suppose what was suggested by Chief Justice Dorion were really to happen, that the Dominion government were to take steps to set aside the transaction, could the government of Quebec be heard to say, "True, the transaction will not stand as a transfer of the railway, or of the rights, powers, liabilities, and duties of the company, but it may enure as a sale of the lands acquired in order to the construction of the railway, or part of them, in the exercise of the power in question." Would not the answer be, "there is no trace of such a contract, or of an intention to make it?"

By the evidence taken on this proceeding, it appeared that a considerable part of the lands, rolling stock, and other property seized, had never belonged to the company, but had been purchased by the commissioners since 1875.

In respect of that property, the Attorney General was entitled to succeed in his opposition. He should, however, have been held to have failed as to the lands, etc., which had belonged to the company. And in their Lordships' opinion, the proper order to be made was one which would have upheld the seizure as to this latter part of the property in question, whilst it granted *main levée* as to the rest, leaving each party to pay their own costs. Since the execution must now altogether fail by reason of the award having been set aside, it will not be necessary to draw up a formal order to the above effect.

The order which their Lordships will humbly recommend Her Majesty to make on the four consolidated appeals will be to the following effect, viz., to dismiss the appeals numbered respectively 13 and 144, and to allow those numbered respectively 117 and 141; to affirm the judgment of the court of Queen's Bench (record 180)

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in the suit No. 693, wherein the company was plaintiff, and the appellants and others were defendants; to reverse so much of the judgment of the court of Queen's Bench (record 286) in the action 1213, wherein the appellants were plaintiffs, and the company were defendants, and the Attorney General intervenor, as relates to the intervention of the Attorney General, and in lieu thereof to affirm so much of the judgment of the Superior court in the same suit as relates to such intervention, with the costs of the appeal to the Queen's Bench; but to affirm in all other respects the last mentioned judgment of the court of Queen's Bench; to reverse the judgment of the court of Queen's Bench in the matter of the opposition "*à fin de distraire*," and to declare that in lieu thereof, an order should have been made reversing the judgment of the Superior court in such matter, and declaring that the opposition should have been allowed as to so much only of the property seized as had been purchased by the commissioners since 1875, and disallowed as to the rest, and that each party should bear their own costs in both courts, but that by reason of the failure of the execution in consequence of the setting aside of the award, it had become unnecessary to draw up any such order.

Their Lordships are of opinion that, under the circumstances, no order should be made as to the costs of these consolidated appeals.

*Insolvency.*CUSHING V. DEPUIS¹

16. The parliament of Canada in legislating on subject of insolvency, under the powers given by the *British North America Act* of 1867, s. 91, has the right to interfere with property, civil rights or procedure within the provinces, as far as it is necessary to the general law enacted on the subject.

17. The word "final" in the 28th section of the *Insolvent Act* of 1875 refusing an appeal, is not to be confined only to Canadian courts, but excludes appeals to the Privy Council, although it does not affect the prerogative of the crown to allow such appeals as an act of grace.

SIR MONTAGUE E. SMITH, p. 413:—That question, which has been fully argued at the Bar, raises two points; first, whether the court of Queen's Bench was right in holding that the appeal to Her Majesty in Council, give *de jure* by Art. 1178 of the Code of Civil Procedure, from final judgments rendered on appeal by that court, is taken away by the Insolvency Act; and, secondly, if that be so, whether the power of the crown, by virtue of its prerogative, to admit the appeal is affected by that Act.

The 128th section of the Insolvency Act enacts as follows:—

"In the Province of Quebec all decisions by a judge in chambers in matters of insolvency shall be considered as judgments of the

¹ Quebec, 1880 April 15, L. R. V Appeal Cases 403.

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Superior court; and any final order or judgment rendered by such judge or court may be inscribed for revision, or may be appealed from by the parties aggrieved, in the same cases and in the same manner as they might inscribe for revision or appeal from a final judgment of the Superior court in ordinary cases under the laws in force when such decision shall be rendered."

By the 28th section of a subsequent Act of the Parliament of Canada, 40 Vict., c. 41, it is enacted that the 128th section of the former Act shall be amended by adding thereto the following words:—

"The judgment of the court to which, under this section, the appeal can be made shall be final."

This court, in the Province of Quebec, is the court of Queen's Bench.

The whole question turns on these added words, and in considering their effect on the right of appeal to the crown given *de jure* by the code, two things are to be regarded: (1), the power of the Dominion Parliament to abrogate this right; and (2), if it had the power, whether it intended to exercise it.

The first of these questions depends upon the construction of the British North American Act, 1867, which confers and distributes legislative powers. By section 91 of that Act, exclusive legislative authority in certain matters is conferred upon the Parliament of Canada, and by section 92 exclusive authority in certain others upon the Provincial Legislatures.

Section 92 enacts:—

"In each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

"13. Property and civil rights.

"14. The administration of justice in the province, including the constitution, maintenance, and organization of provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts."

It was contended for the appellant that the provisions of the Insolvency Act interfered with property and civil rights, and was therefore *ultra vires*. This objection was very faintly urged, but it was strongly contended that the Parliament of Canada could not take away the right of appeal to the Queen from final judgments of the court of Queen's Bench, which, it was said, was part of the procedure in civil matters exclusively assigned to the Legislature of the Province.

The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, or without providing some mode of special procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the

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Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the provinces, so far as a general law relating to those subjects might affect them. Their Lordships therefore think that the Parliament of Canada would not infringe the exclusive powers given to the Provincial Legislatures, by enacting that the judgment of the court of Queen's Bench in matters of insolvency should be final, and not subject to the appeal as of right to Her Majesty in Council allowed by Art. 1178 of the Code of Civil Procedure. Nor, in their Lordships' opinion, would such an enactment infringe the Queen's prerogative, since it only provides that the appeal to Her Majesty given by the Code framed under the authority of the Provincial Legislature, as part of the civil procedure of the province, shall not be applicable to judgments in the new proceedings in insolvency which the Dominion Act creates. Such a provision in no way trenches on the Royal prerogative.

Then it was contended that if the Parliament of Canada had the power, it did not intend to abolish the right of appeal to the crown. It was said that the word "final" would be satisfied by holding that it prohibited an appeal to the Supreme court of Canada, established by the Dominion Act of the 38th Vict., c. 11. Their Lordships think the effect of the word cannot be so confined. It is not reasonable to suppose that the Parliament of Canada intended to prohibit an appeal to the Supreme Court of Appeal recently established by its own legislation, and to allow the right of immediate appeal from the court of Queen's Bench to the Queen to remain. Besides the word "final" has been before used in colonial legislation as an apt word to exclude in certain cases appeals as of right to Her Majesty. (See the Lower Canada Statute, 34 Geo. 3, c. 30.) Such an effect may, no doubt, be excluded by the context, but there is none in the enactment in question to limit the meaning of the word. For these reasons their Lordships think that the judges below were right in holding that they had no power to grant leave to appeal.

The question of the power of the Queen to admit the appeal, as an act of grace, gives rise to different considerations. It is in their Lordships' view unnecessary to consider what powers may be possessed by the Parliament of Canada to interfere with the royal prerogative; since the 28th section of the Insolvency Act does not profess to touch it, and they think, upon the general principle that the rights of the crown can only be taken away by express words, that the power of the Queen to allow this appeal is not affected by that enactment. In consequence, however, of the decision in *Cuillier v. Aylwin* (2 Knapp's P. C., 72) which has been relied on as an authority opposed to this view, it becomes necessary to review that case in connection with the subsequent decisions on the subject.

The question in *Cuillier v. Aylwin* arose upon the Lower Canada Colonial Act, 34 Geo. 3, c. 6, which enacted that the judgment of the court of Appeals should be final in all cases under the value of 500*l.*, and an application for special leave to appeal in a case under that value was refused by a committee of the Privy Council. The re-

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marks attributed to the Master of the Rolls in his judgment rejecting the petition are directed to one aspect only of the question, viz., the power of the crown with the other branches of the legislature to deprive the subject of one of his rights. No allusion was made to the principle that express words are necessary to take away the prerogative rights of the crown, nor to the provision contained in the statute itself, that nothing therein contained should derogate from any right or prerogative of the crown. This case, moreover, if not expressly overruled, has not been followed, and later decisions are opposed to it.

In *re Louis Marois* (reported in 15 Moore, P. C. 189) upon an application for leave to appeal from a judgment of the court of Queen's Bench for Lower Canada, Lord Chelmsford, in giving the judgment of this committee, after stating that in *Cuvillier v. Aylwin* the very point was decided against the petitioner, said :—.....

Leave to appeal was granted in that case, subject to the risk of a petition being presented to dismiss the appeal as incompetent. Although their Lordships, in granting this leave, said that they desired to intimate no opinion whether the decision in *Cuvillier v. Aylwin* could be sustained or not, it is obvious that, at the least they regarded it as being open to review.

In *Johnston v. the Minister and Trustees of St. Andrew's Church* (*L. R. 3 Appeal Cases* 459), upon an application for special leave to appeal against a judgment of the Supreme Court of Canada, the effect of the 47th section of the Act, establishing that court, which enacted that its judgments should be final and conclusive, saving any right which Her Majesty may be graciously pleased to exercise by virtue of her royal prerogative, came in question, and the Lord Chancellor, in giving the judgment of this committee, said :—

" Their Lordships have no doubt whatever that assuming, as the petitioners do assume, that their power of appeal as a matter of right is not continued, still that Her Majesty's prerogative to allow an appeal, if so advised, is left entirely untouched and preserved by this section."

Although leave to appeal was in this instance refused, on the ground that the case was not a proper one for the exercise of the prerogative, the opinion cited above is virtually opposed to the decision in *Cuvillier v. Aylwin*, where, it is to be remembered, the Act in question likewise contained a saving of the prerogative of the crown.

Another case, lately before this committee requires consideration, *Théberge and another v. Landry* (*L. R. 2 Appeal Cases*, 102). It was an application for special leave to appeal against a judgment of the Superior Court of Quebec upon an election petition, by which the applicant had been unseated for corrupt practices. By the Quebec Controverted Elections Act, 1875, the decision of controverted elections, which formerly belonged to the Legislative Assembly itself, was conferred upon the Superior court, and by section 90 of the Act it was enacted that the judgment of that court sitting in review should not be susceptible of appeal. It was held by this committee that there was no prerogative right in the crown to review the

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judgment of the Superior court upon an election petition, and the application was refused. This decision turned on the peculiar nature of the jurisdiction delegated to the Superior court, and not merely on the prohibitory words of the statute. It was distinctly and carefully rested on the ground of the peculiarity of the subject matter, which concerned not mere ordinary civil rights, but rights and privileges always regarded as pertaining to the Legislative Assembly, in complete independence of the crown, so far as they properly existed; and consequently it was held that, in transferring the decision of these rights from the Assembly to the Superior court, it could not have been intended that the determination in the last resort should belong to the Queen in Council. But, whilst coming to this decision, the Lord Chancellor, in giving the judgment of the committee, affirmed the general principle as to the prerogative of the crown:—

"Their Lordships wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the crown cannot be taken away, except by express words; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative."

It was not suggested that an appeal would not have lain to the Queen in council under the Insolvency Act of 1875; and it was not until two years afterwards that the Amending Act of 1877, which is said to have taken it away, was passed.

The learned counsel for the appellant drew attention to the Act of the Parliament of Canada, 31 Vict., c. 1, which enacts rules of interpretation to be applied to all future legislation, when not inconsistent with the intent of the act or the context.

Sub-section 33 of section 7 of that Act is as follows:—

"No provision or enactment in any Act shall affect in any manner or way whatsoever the rights of her Majesty, her heirs, or successors, unless it is expressly stated that Her Majesty shall be bound thereby."

The Insolvent Acts are to be construed with reference to this provision, which is substantially an affirmation of the general principle.

Contracts.**CITIZENS INSURANCE COMPANY OF CANADA, AND QUEEN INSURANCE COMPANY V. PARSON¹**

18. The words "*property and civil rights in the province*," No. 18, sect. 92 of the *British America Act*, 1867, include rights arising from contracts, not in express terms included in sect. 91, and are not limited to such rights only as flow from the law, e. g., the status of persons. Therefore the subject of incorporating insurance companies against fire

¹ S. C. Ontario, 1881 28 Nov., L. R. VIII Appeal Cases 96.

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and of prescribing certain conditions which are to form part of such contracts, falls within the powers conferred upon the provinces. And this legislation is applicable to all companies whether incorporated by the provincial or federal parliament.

19. The act of the Province of Ontario, 38 Vict., ch. 24, enacting that contracts of insurance made within the province shall be subject to certain conditions, is valid.

SIR MONTAGUE SMITH, p. 108: — Notwithstanding this endeavour to give pre-eminence to the Dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion Parliament. Take as one instance the subject "marriage and divorce," contained in the enumeration of subjects in sect. 91. It is evident that solemnization of marriage come within this general description; yet solemnization of marriage in the province "is enumerated among the classes of subjects in sect. 92, and no one can doubt, notwithstanding the general language of sect. 91, that this subject is still within the exclusive authority of the legislatures of the provinces. So "the raising of money by any mode or system of taxation" is enumerated among the classes of subjects in sect. 91; but, though the description is sufficiently large and general to include "direct taxation within the province, in order to the raising of a revenue for provincial purposes," assigned to the provincial legislatures by sect. 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one. With regard to certain classes of subjects, therefore, generally described in sect. 91, legislative power may reside, as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the courts, however difficult it may be to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and where necessary, modified, by that of the other.

In this way it may, in most cases, be found possible to arrive at a reasonable and practicable construction of the language of the section, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

The first question to be decided is, whether the Act impeached in the present appeals falls within any of the classes of subjects

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enumerated in section 92, and assigned exclusively to the legislatures of the Provinces, for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the Provincial Legislature *prima facie* falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and whether the power of the Provincial Legislature is or is not thereby overborne.

The main contention on the part of the respondent was that the Ontario Act in question had relation to matters coming within the class of subjects described in No. 13 of section 92, viz., "Property and Civil Rights in the Province." The Act deals with policies of insurance entered into or in force in the Province of Ontario for insuring property situate therein against fire, and prescribes certain conditions which are to form part of such contracts. These contracts, and the rights arising from them, it was argued, came legitimately within the class of subject, "Property and Civil Rights." The appellants, on the other hand, contended that civil rights meant only such rights as flowed from the law, and gave as an instance the *status* of persons. Their Lordships cannot think that the latter construction is the correct one. They find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words "civil rights." The words are sufficiently large to embrace in their fair and ordinary meaning, rights arising from contract, and such rights are not included in any of the enumerated classes of subjects in section 91.

It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sections 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited. In looking at section 91 it will be found not only that there is no class including, generally, contracts and the rights arising from them, but that one class of contracts is mentioned and enumerated, viz., "18, bills of exchange and promissory notes," which it would have been unnecessary to specify if authority over all contracts and the rights arising from them had belonged to the Dominion Parliament.

The provision found in section 94 of the British North America Act, which is one of the sections relating to the distribution of legislative powers, was referred to by the learned counsel on both sides as throwing light upon the sense in which the words "property and civil rights" are used. By that section the Parliament of Canada is empowered to make provision for the uniformity of any laws relative to "property and civil rights" in Ontario, Nova Scotia and New Brunswick, and to the procedure of the courts in these three provinces, if the provincial legislatures choose to adopt the provision so made. The Province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is in the main the French law, as it existed

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at the time of the cession of Canada, and not the English law which prevails in the other provinces. The words "property and civil rights" are, of course, used in the same sense in this section as in No. 13 of section 92, and there seems no reason for presuming that contracts and the rights arising from them were not intended to be included in this provision for uniformity. If, however, the narrow construction of the words "civil rights," contended for by the appellants, were to prevail, the Dominion Parliament could, under its general power, legislate in regard to contracts in all and each of the provinces, and, as a consequence of this, the Province of Quebec, though now governed by its own Civil Code, founded on the French law, as regards contracts and their incidents, would be subject to have its law on that subject altered by the Dominion Legislature, and brought into uniformity with the English law prevailing in the other three provinces, notwithstanding that Quebec has been carefully left out of the uniformity section of the Act.

It is to be observed that the same words, "civil rights," are employed in the Act of 14 George III, c. 83, which made provision for the government of the Province of Quebec. Section 8 of that Act enacted that His Majesty's Canadian subjects within the Province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights, resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words "property" and "civil rights" are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one.

The next question for consideration is whether, assuming the Ontario Act to relate to the subject of property and civil rights, its enactments and provisions come within any of the classes of subjects enumerated in section 91. The only one which the appellants suggested as expressly including the subject of the Ontario Act is No. 2, the "regulation of trade and commerce."

A question was raised which led to much discussion in the courts below and at this bar, viz., whether the business of insuring buildings against fire was a trade. This business, when carried on for the sake of profit, may, no doubt, in some sense of the word, be called a trade. But contracts of indemnity made by insurers can scarcely be considered trading contracts, nor were insurers who made them held to be "traders" under the English bankruptcy laws; they have been made subject to these laws by special description. Whether the business of fire insurance properly falls within the description of "a trade" must, in their Lordships' view, depend upon the sense in which that word is used in the particular statute to be construed; but in the present case their Lordships do not find it necessary to rest their decision on the narrow ground that the business of insurance is not a trade.

The words "regulation of trade and commerce," in their unlimited sense, are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments,

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requiring the sanction of Parliament, down to minute rules for regulating particular trades. But a consideration of the Act shows that the words were not used in this unlimited sense. In the first place, the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations referring to general trade and commerce were in the mind of the Legislature, when conferring this power on the Dominion Parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in section 91 would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency.

"Regulation of trade and commerce" may have been used in some such sense as the words "regulations of trade" in the Act of Union between England and Scotland (6 Anne, c. 11), and as these words have been used in other Acts of State. Article V of the Act of Union enacted that all the subjects of the United Kingdom should have "full freedom and intercourse of trade and navigation" to and from all places in the United Kingdom and the colonies: and article VI enacted that all parts of the United Kingdom from and after the Union should be under the same "prohibitions, restrictions, and regulations of trade." Parliament has at various times since the Union passed laws affecting and regulating specific trades in one part of the United Kingdom only, without its being supposed that it thereby infringed the articles of Union. Thus the Acts for regulating the sale of intoxicating liquors notoriously vary in the two kingdoms. So with regard to Acts relating to bankruptcy, and various other matters.

Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance, in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the Legislature of Ontario by No. 13 of section 92.

Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, when competently exercised by the Dominion Parliament, might legally modify or affect property and civil rights in the provinces, or the legislative power of the Provincial Legislatures in relation to those subjects; questions of this

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kind, it may be observed, arose and were treated of by this Board in the cases of *L'Union St. Jacques de Montréal v. Belisle*, L. R. 6 P. C. 31, and *Cushing v. Dupuy*, L. R. 5 Appeal cases 409.

It was contended in the case of the Citizens Insurance Company of Canada, that the company having been originally incorporated by the late Province of Canada, and having had its incorporation and corporate rights confirmed by the Dominion Parliament, could not be affected by an Act of the Ontario Legislature. But the latter Act does not assume to interfere with the constitution or status of corporations. It deals with all insurers alike, including corporations and companies, whatever may be their origin, whether incorporated by British authority, as in the case of the Queen Insurance company, or by foreign or colonial authority, and without touching their status, requires that if they choose to make contracts of insurance in Ontario, relating to property in that province, such contracts shall be subject to certain conditions.

It was further urged that the Ontario Act was repugnant to the Act of the late Province of Canada, which empowered the company to make contracts for assurance against fire "upon such conditions as might be bargained for and agreed upon between the company and the assured." But this is, in substance, no more than an expanded description of the business the company was empowered to transact, viz., to make contracts of assurance against fire, and can scarcely be regarded as inconsistent with the specific legislation regarding such contracts contained in the act in question.

It was further argued on the part of the appellants that the Ontario Act was inconsistent with the Act of the Dominion Parliament, 38 Vict., c. 20, which requires fire insurance companies to obtain licenses from the Minister of Finance as a condition to their carrying on the business of insurance in the Dominion, and that it was beyond the competency of the Provincial Legislature to subject companies which had obtained such licenses, as the appellant companies had done, to the conditions imposed by the Ontario Act. But the legislature does not really conflict or present any inconsistency. The statute of the Dominion Parliament enacts a general law applicable to the whole Dominion, requiring all insurance companies, whether incorporated by foreign, Dominion, or Provincial authority to obtain a license from the Minister of Finance, to be granted only upon compliance with the conditions prescribed by the Act. Assuming this Act to be within the competency of the Dominion Parliament as a general law applicable to foreign and domestic corporations, it in no way interferes with the authority of the Legislature of the Province of Ontario to legislate in relation to the contracts which corporations may enter into in that province. The Dominion Act contains the following provision, which clearly recognises the right of the Provincial Legislature to incorporate insurance companies for carrying on business within the province itself:—

"But nothing herein contained shall prevent any insurance company incorporated by or under any Act of the Legislature of the late Province of Canada, or of any province of the Dominion of Canada, from carrying on any business of insurance within the

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"limits of the late Province of Canada, or of such province only according to the powers granted to such insurance company within such limits as aforesaid, without such license as hereinafter mentioned."

This recognition is directly opposed to the construction sought to be placed by the appellants' counsel on the words "provincial objects" in No. 11 of section 92,—“the incorporation of companies with provincial objects,” by which he sought to limit these words to “public” provincial objects, so as to exclude insurance and commercial companies.

Chief Justice Ritchie refers to an equally explicit recognition of the power of the provinces to incorporate insurance companies contained in an earlier Act of the Dominion Parliament (31 Vict., c. 48) which was passed shortly after the establishment of the Dominion.

The learned Chief Justice also refers to a remarkable section contained in the Act of the Dominion Parliament consolidating certain acts respecting insurance, 45 Vict., c. 42. Section 28 of that act is as follows:—

“This Act shall not apply to any company within the exclusive legislative control of any one of the provinces of Canada, unless such company so desires; and it shall be lawful for any such company to avail itself of the provisions of this act, and if it did so avail itself, such company shall then have the power of transacting its business of insurance throughout Canada.”

This provision contains a distinct declaration by the Dominion Parliament that each of the provinces had exclusive legislative control over the insurance companies incorporated by it, and therefore is an acknowledgment that such control was not deemed to be an infringement of the power of the Dominion Parliament as to “the regulation of trade and commerce.”

The declarations of the Dominion Parliament are not, of course, conclusive upon the construction of the British North America Act; but when the proper construction of the language used in that Act to define the distribution of legislative powers is doubtful, the interpretation put upon it by the Dominion Parliament in its actual legislation may properly be considered.

The opinions of the majority of the Judges in Canada, as summed up by Chief Justice Ritchie, are in favour of the validity of the Ontario Act. In the present action, the Court of Queen's Bench and the Court of Appeal of Ontario unanimously supported its legality; and the Supreme Court of Canada by a majority of three Judges to two, have affirmed the judgment of the Provincial Courts. The opinions of the learned Judges of the Supreme Court of Canada are stated with great fullness and ability, and clearly indicate the opposite views which may be taken of the act, and the difficulties which surround any construction that may be given to it.

Mr. Justice Taschereau, in the course of his vigorous judgment, sought to place the Plaintiff in the action against the Citizens company in a dilemma. He thinks that the assertion of the right of the province to legislate with regard to the contracts of insurance companies amounts to a denial of the right of the Dominion Parliament

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to do so, and that this is, in effect, to deny the right of that Parliament to incorporate the Citizens company, so that the Plaintiff was suing a non-existent defendant. Their Lordships cannot think that this dilemma is established. The learned Judge assumes that the power of the Dominion Parliament to incorporate companies to carry on business in the Dominion is derived from one of the enumerated classes of subjects, viz., "the regulation of trade and commerce," and then argues that if the authority to incorporate companies is given by this clause, the exclusive power of regulating them must also be given by it, so that the denial of one power involves the denial of the other.

But, in the first place, it is not necessary to rest the authority of the Dominion Parliament to incorporate companies on this specific and enumerated power. The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, and the only subject on this head assigned to the Provincial Legislature being "the incorporation of companies with provincial objects," it follows that the incorporation of companies for objects other than provincial falls within the general powers of the Parliament of Canada. But it by no means follows (unless indeed the view of the learned Judge is right as to the scope of the words "the regulation of trade and commerce") that because the Dominion Parliament had alone the right to create a corporation to carry on business throughout the Dominion that it alone has the right to regulate its contracts in each of the provinces. Suppose the Dominion Parliament were to incorporate a company, with power, among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended if such a company were to carry on business in a province where a law against holding land in mortmain prevailed (each province having exclusive legislative power over "property and civil rights in the province") that it could hold land in that province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body.

On the best consideration they have been able to give to the arguments addressed to them and to the judgments of the learned judges in Canada, their Lordships have come to the conclusion that the Act in question is valid.

Corporations.

DOBIE V. THE TEMPORALITIES BOARD FOR THE MANAGEMENT OF
THE TEMPORALITIES FUND OF THE PRESBYTERIAN CHURCH
OF CANADA CORPORATION¹

20. The charter of a corporation created by the parliament of Canada to have its existence in Quebec and Ontario,

¹ Quebec, 1882 Jan. 21, L. R. VII Appeal Cases 136.

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cannot be repealed or modified by the legislature of either province, or even by the conjoint operation of both, but only by Dominion parliament.

LORD WATSON, p. 147:—The act of the Parliament of the province of Canada, 22 Vict., c. 66, was, after the passing of the B. N. A. Act, 1867, continued into force within the provinces of Ontario and Quebec by virtue of sect. 129 of the latter statute, which *inter alia* enacts that except as therein provided all laws in force in Canada at the time of the union thereby affected, shall continue in Ontario and Quebec as if the union had not been made. But that enactment is qualified by the provision that all such laws with the exception of those enacted by the Parliament of Great Britain, shall be subject "to be repealed, abolished, or altered by the Parliament of Canada or by the Legislature of the respective provinces according to the authority of the parliament or that legislature under this act. The powers conferred by this section upon the provincial legislature of Ontario and Quebec to repeal and alter the statutes of the old parliament of the province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the act of 1867. In order, therefore, to ascertain how far the provincial legislature of Quebec had power to alter and amend the act of 1858 incorporating the Board for the management of the Temporalities Fund, it becomes necessary to revert to sects. 91 and 92 of the British N. A. A., which enumerates and defines the various matters which are within the exclusive legislative authority of the Parliament of Canada, as well as those in relation to which the legislatures of the respective provinces have the exclusive rights of making laws. If it could be established that, in the absence of all previous legislation on the subject the legislature of Quebec would have been authorized by sect. 92 to pass an Act in terms identical with the 22 Vict., c. 66, then it would follow that the act of the 22nd Vict. has been validly amended by the 38 Vict., c. 64. On the other hand, if the legislature of Quebec has not derived such power of enactment from sect. 92, the necessary inference is that the legislative authority required, in terms of sect. 129, to sustain its right to appeal or alter an old law of the parliament of Canada is in this case wanting, and that the act 38 Vict., c. 64, was not *intra vires* of the legislature by which it was passed.

The general scheme of the B. N. A. Act, 1867, and in particular the general scope and effect of sect. 91 and 92 have been so fully commented upon by this Board in the recent cases of the *Citizens Insurance Company v. Parsons*, that it is unnecessary to say anything further upon that subject. Their Lordships see no reason to modify in any respect the principles of law upon which they proceeded in deciding these cases; but in determining how far these principles apply to the present case, it is necessary to consider to what extent the circumstances of each case are identical or similar.

The case of *The Citizens Insurance Company of Canada v. Parsons* comes nearest in its circumstances to the present, as in that case the

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appellant company was incorporated by, and derived all its statutory rights and privileges from an Act of the Province of Canada, whereas, *The Queen Insurance Company* was incorporated under the provisions of the British Joint Stock Companies Act, 7 and 8 Vict., cap. 110. In both cases the validity of an act of the Legislature of Ontario was impeached on the ground that its provisions were *ultra vires* of a provincial Legislature, and were not binding unless enacted by the Parliament of Canada. It was contended on behalf of the Citizens Insurance company that the statute complained of was invalid in respect that it virtually repealed certain rights and privileges which they enjoyed by virtue of their act of incorporation. That contention was rejected, and the decision in that case would be a precedent fatal to the contention of the appellant, if the provisions of the Ontario Act, 39 Vict., cap. 31, and the Quebec Act, 38 Vict., chap. 64, were of the same or substantially the same character. But upon an examination of those two statutes, it becomes at once apparent that there is a marked difference in the character of their respective enactments. The Ontario Act merely prescribed that certain conditions should attach to every policy, entered into or in force, for insuring property situate within the Province against the risk of fire. It dealt with all corporations, companies and individuals alike who might choose to insure property in Ontario,—it did not interfere with their constitution or *status*, but required that certain reasonable conditions should be held as inserted in every contract made by them. The Quebec Act, 38 Vict., cap. 64, on the contrary, deals with a single statutory trust, and interferes directly with the constitution and privileges of a corporation created by an act of the Province of Canada, and having its corporate existence and corporate rights in the Province of Ontario, as well in the Province of Quebec. The professed object of the act and the effect of its provisions is not to impose conditions on the dealings of the corporation with its funds within the Province of Quebec, but to destroy, in the first place, the old corporation, and create a new one, and, in the second place, to alter materially the class of persons interested in the funds of the corporation.

According to the principles established by the judgment of this Board in the cases already referred to, the first step to be taken, with a view to test the validity of an Act of the Provincial Legislature, is to consider whether the subject matter of the act falls within any of the classes of subjects enumerated in sec. 92. If it does not, then the act is of no validity. If it does, then these further questions may arise, viz., “whether, notwithstanding that it is so, the subject of the act does not also fall within one of the enumerated classes of subjects in sec. 91, and whether the power of the Provincial Legislature is or is not thereby overborne.”

Does then the Act, 38 Vict., c. 64, fall within any of the classes enumerated in sec. 92, and thereby assigned to the Provincial Legislatures? Their Lordships are of opinion that it does not; and consequently that its enactments are invalid, and that the constitution and duties of the Board for managing the Temporalities Fund must still be regulated by the Act of 1855.

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It was contended by the respondents that the Quebec Act of 1875 is within one or more of these three classes of subjects enumerated in sec. 92.—

"(7). The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province other than the marine hospitals."

"(11). The incorporation of companies with provincial objects."

"(13). Property and civil rights in the Province."

The most plausible argument for the respondent was founded upon the terms of Class (13), but it has failed to satisfy their Lordships that the statute impeached by the appellant is a law in relation to property and civil rights within the Province of Quebec.

The Quebec Act of 1875 does not, as has already been pointed out, deal directly with property, or contracts affecting property, but with the civil rights of a corporation, and of individuals, present or future, for whose benefit the corporation was created and exists. If these rights and interests were capable of division according to their local position in Ontario and Quebec, respectively, the Legislature of each Province would have power to deal with them so far as situate within the limits of its authority. If, by a single Act of the Dominion Parliament, there had been constituted two separate corporations, for the purpose of working, the one a mine within the Province of Upper Canada, and the other a mine in the Province of Lower Canada, the Legislature of Quebec would clearly have had authority to repeal the Act so far as it related to the latter mine and the corporation by which it was worked.

The Quebec Act 38 Vict., cap. 64, does not profess to repeal and amend the Act of 1858, only in so far as its provisions may apply to or be operative within the Province of Quebec, and its enactments are apparently not framed with a view to any such limitation. The reason is obvious and is a reason which appears to their Lordships to be fatal to the validity of the act. The corporation and the corporate trust, the matter to which its provisions relate, are in reality not divisible according to the limits of provincial authority. In every case where an act applicable to the two Provinces of Quebec and Ontario can now be validly repealed by one of them, the result must be to leave the act in full vigour within the other Province. But, in the present case, the legislation of Quebec must necessarily affect the rights and status of the corporation as previously existing in the Province of Ontario, as well as the rights and interests of individual corporations in that Province. In addition to that, the fund administered by the corporate Board, under the Act of 1858, is held in perpetuity for the benefit of the ministers and members of a Church having its local situation in both Provinces, and the proportion of the fund and its revenues falling to either Province is uncertain and fluctuating, so that it would be impossible for the Legislature of Quebec to appropriate a definite share of the corporate funds to their own Province without trenching on the rights of the corporation in Ontario.

These observations regarding Class (13) apply with equal force to the argument of the respondents founded on Classes (7) and (11).

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Even assuming that the Temporalities Fund might be correctly described as a "charity" or as an "eleemosynary institution," it is not in any sense established, maintained, or managed "in or for" the Province of Quebec; and if the Board, incorporated by the Act of 1858, could be held to be a "company" within the meaning of Class (11) its objects are certainly not provincial.

The respondents further maintained that the Legislature of Quebec had power to pass the Act of 1875, in respect of these special circumstances, (1) that the domicile and principal office of the Temporalities Board is in the city of Montreal; and (2) that its funds also are held or invested within the Province of Quebec. These facts are admitted on record by the appellant, but they do not affect the question of legislative power. The domicile of the corporation is merely forensic, and cannot alter its statutory constitution as a Board in and for the Provinces of Upper Canada and Lower Canada. Neither can the accident of its funds being invested in Quebec give the Legislature of that Province authority to change the constitution of a corporation with which it would otherwise have no right to interfere. When funds belonging to a corporation in Ontario are so situated or invested in the Province of Quebec, the Legislature of Quebec may impose direct taxes upon them for provincial purposes, as authorized by section 92 (2), or may impose conditions upon the transfer or realization of such funds; but that the Quebec Legislature shall have power also to confiscate these funds, or any part of them, for provincial purposes, is a proposition for which no warrant is to be found in the Act of 1867.

Last of all it was argued for the respondents that, assuming the incompetency of either Provincial Legislature, acting singly, to interfere with the Act of 1848, that statute might be altered or repealed by their joint and harmonious action. The argument is based upon fact, because, in the year 1874, the Legislature of Ontario passed an act (38 Vict., cap. 75), authorizing the union of the four Churches, and containing provisions in regard to the Temporalities Fund and its Board of Management, substantially the same with those of the Quebec Act, 38 Vict., cap. 62, already referred to. It is difficult to understand how the maxim *juncta juvant* is applicable here, seeing that the power of the Provincial Legislature to destroy a law of the old Province of Canada is measured by its capacity to reconstruct what it has destroyed. If the Legislature of Ontario and Quebec were allowed jointly to abolish the Board of 1858, which is one corporation in and for both Provinces, they could only create in its room two corporations, one of which would exist in and for Ontario and be a foreigner in Quebec, and the other of which would be foreign to Ontario but a domestic institution in Quebec. Then the funds of the Ontario corporation could not be legitimately settled upon objects in the Province of Quebec, and as little could the funds of the Quebec corporation be devoted to Ontario, whereas the Temporalities Fund falls to be applied either in the Province of Quebec or in that of Ontario and that in such amounts or proportions as the needs of the Presbyterian Church of Canada in connection with the Church of Scotland, and of its ministers and

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congregations, may from time to time require. The Parliament of Canada is, therefore, the only Legislature having power to modify or repeal the provisions of the Act of 1858.

Corporations.

COLONIAL BUILDING AND INVESTMENT ASSOCIATION V. ATTORNEY
GENERAL OF QUEBEC ¹

21. The Dominion parliament alone has the right to incorporate a body with the powers to carry on a certain definite kind of business, and to hold lands, in the whole Dominion.

22. The fact that such corporation chose to confine the exercise of its powers to one province, and to local and provincial objects did not affect its status as a corporation. And a distinction must be made between the rights of such corporation to hold lands in the provinces, and the fact that it does hold lands without the consent of the Crown in the provinces.

SIR MONTAGUE E. SMITH, p. 166 : — The broad objection taken by the Attorney General in the petition is, that the Association was not legally incorporated, the statute incorporating it being *ultra vires* of the Parliament of the Dominion.

The judgment of the Superior court, given by Mr. Justice Caron, distinctly overruled this objection. Mr. Justice Tessier is the only Judge of the Court of Queen's Bench who affirmed it. Chief Justice Dorian, in a judgment which received the concurrence of two other Judges, acknowledged that having regard to the observations of this Board in the case of *The Citizens Insurance Company of Canada v. Parsons* (L. R., 7 Appeal Cases, 96) it could not be held that the incorporation of the Association was beyond the powers of the Dominion Parliament, and illegal; and the majority of the court gave judgment upon the assumption, as their Lordships understand the reasons of the Judges, that the Association was lawfully incorporated. The conclusion of the formal judgment of the Court is as follows : —

"The said Company, Respondents, had and have no right to act as a corporation for or in respect of any of the said operations of buying, leasing or selling of landed property, buildings, and appurtenances thereof, or the purchase of building materials to construct villas, homesteads, cottages, or other buildings and premises, or the selling or letting of the same, or the establishment of a building or subscription fund for investment or building purposes, or the acting as agents in connection with such operations as the aforesaid, or any like affairs, or any matter of property or civil rights, or any objects of a purely local or provincial nature in any manner or way within the said Province of Quebec, and doth prohibit the said Company Respondents, from acting as a corporation

¹ Quebec, 1883 Dec. 1, L. R. IX Appeal Cases 157.

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"within the said Province of Quebec for any of the ends or the purposes aforesaid."

Mr. Justice Monk, in a short but clear judgment, dissented from his colleagues, and agreed with Mr. Justice Caron's judgment.

Their Lordships cannot doubt that the majority of the court was right in refusing to hold that the Association was not lawfully incorporated. Although the observations of this Board in the *Insurance Company v. Parsons*, referred to by the Chief Justice, put a hypothetical case by way of illustration only, and cannot be regarded as a decision on the case there supposed, their Lordships adhere to the view then entertained by them as to the respective powers of the Dominion and Provincial Legislatures in regard to the incorporation of companies.

It is asserted in the petition, and was argued in the courts below, and at this bar, that inasmuch as the association had confined its operations to the Province of Quebec, and its business had been of a local and private nature, it followed that its objects were local and provincial, and consequently that its incorporation belonged exclusively to the Provincial Legislature. But surely the fact that the association has hitherto thought fit to confine the exercise of its powers to one province cannot affect its status or capacity as a corporation, if the act incorporating the association was originally within the legislative power of the Dominion Parliament. The company was incorporated with powers to carry on its business, consisting of various kinds, throughout the Dominion. The Parliament of Canada could alone constitute a corporation with those powers; and the fact that the exercise of them has not been co-extensive with the grant, cannot operate to repeal the act of incorporation, nor warrant the remedy prayed for, viz., that the company be declared to be illegally constituted.

It is unnecessary to consider what remedy, if any could be resorted to if the incorporation had been obtained from Parliament with a fraudulent object, for the only evidence given in the case discloses no ground for suggesting fraud in obtaining the act.

Their Lordships therefore think that the courts in Canada were right in holding that it was not competent to them to declare, in accordance with the prayer of the petition, that the Association was illegally incorporated, and ought to be dissolved.

There remains the question, which was mainly argued at the bar, whether the judgment of the Court of Queen's Bench which shortly stated, declares that the Association has no right to act as a Corporation in respect of its most important operations within the Province of Quebec, and prohibiting it from so acting within the province, can be sustained.

It was not disputed by the Counsel for the Attorney General that on the assumption that the Corporation was duly constituted, the prohibition was too wide, and embraced some matters which might be lawfully done in the province, but it was urged that the operations of the Company contravened the provincial law, at the least, in two respects, viz, in dealing in land, and in acting in contravention of the Building Acts of the province.

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It may be granted that, by the law of Quebec, corporations cannot acquire or hold lands without the consent of the Crown. This law was recognized by this Board, and held to apply to foreign corporations in the case of the *Chaudière Gold Mining Company v. Desbarats* (L. R., 5 P. C. 277). It may also be assumed, for the purpose of this appeal, that the power to repeal or modify this law falls within No. 13 of Section 92 of the British North America Act, viz., "Property and Civil Rights within the Province," and belongs exclusively to the Provincial Legislature; so that the Dominion Parliament could not confer powers on the company to override it. But the powers found in the Act of Incorporation are not necessarily inconsistent with the provincial law of mortmain which does not absolutely prohibit corporations from acquiring or holding lands, but only requires, as a condition of their so doing, that they should have the consent of the Crown. If that consent be obtained, a corporation does not infringe the provincial law of mortmain by acquiring and holding lands. What the Act of Incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area viz, throughout the Dominion. Among other things, it has given to the Association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of Incorporation gives it capacity to do so.

It is said, however, that the company has, in fact violated the law of the province by acquiring and holding land without having obtained the consent of the Crown. It may be so, but this is not the case made by the petition. Proceedings founded on the alleged violation by a corporation of the mortmain laws would involve an inquiry opening questions (some of which were touched upon in the arguments at the bar) regarding the scope and effect of these laws, the fact of the Crown's consent, the nature and sufficiency of the evidence of it, the consequences of a violation of the laws, and the proper parties to take advantage of it; questions which are certainly not raised by the allegations and conclusions of this petition.

So with respect to the objections founded on the Acts of the Province with regard to building societies, Chief Justice Dorion appears to be of opinion that, inasmuch as the Legislature of the Province had passed Acts relating to such societies, and defined and limited their operations, the Dominion Parliament was incompetent to incorporate the present Association, having for one of its objects the erection of buildings throughout the Dominion. Their Lordships, at present, fail to see how the existence of those Provincial Acts, if competently passed for local objects, can interfere with the power of the Dominion Parliament to incorporate the Association in question.

If the Association by its operations has really infringed the Provincial Building Societies Acts, a proper remedy may doubtless

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be found, adapted to such a violation of the provincial law; but, as their Lordships have just observed, with reference to the supposed contravention of the mortmain Acts, that is not the case made by the petition.

It now becomes material to examine more closely than has hitherto been done the allegations and conclusions the petition really contains.

The first paragraph, after stating that the corporation carried on its operations in Quebec exclusively, concludes thus: "the whole without being legally incorporated or recognized."

The 2nd paragraph avers that the operations of the company being confined to Quebec, and being of a merely local nature, affecting property and civil rights in the province, "could not lawfully be incorporated except by the authority of the Legislature of the province."

The 3rd paragraph alleges that, for these reasons, "the Act of Incorporation is null and void, the said Act of Incorporation being *ultra vires*."

The conclusion and prayer based on these allegations are, that the Association be declared to be illegally incorporated, be declared dissolved, and prohibited from acting in future as a corporation.

It seems to their Lordships it would be a violation not only of the ordinary rules of procedure, but of fair trial, to decide this appeal upon a new case which assuming a lawful incorporation, rests on the supposed infringement of the laws of the province by the company in conducting its operations. This is not the wrong struck at by the petition, but a wrong-doing raising issues of a wholly different character to those to which the allegations and conclusions of the petition are alone directed and adapted. It is to be observed that the inquiries made of the company's Secretary were of a general nature, and mainly directed to support the allegation in the petition that the company's operations had been limited to the Province of Quebec. No investigation of the title to any of the lands it held nor of any particular transaction, was gone into at the hearing.

The 998th article of the Code of Civil Procedure requires that the summons to be issued "must" be preceded by a petition to the court containing "conclusions adapted to the nature of the contravention," to be supported by an affidavit; and provides that the summons cannot be issued upon such information without the authority of a Judge. It is quite plain that the conclusions of this petition are not adapted to the case now relied on by the Attorney-General; so that neither the general principle regulating procedure nor the special requirements of the Code allow of its being set up on these proceedings.

If the company is really holding property in Quebec without having complied with the law of that province, or is otherwise violating the provincial law, there may be found proceedings applicable to such violation; though it is not for their Lordships to anticipate them, or to indicate their form.

It should be observed that their Lordships, in the case supposed in their judgment in the appeal of the Citizens Insurance Company,

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in regard to corporations created by the Dominion Parliament with power to hold land being subject to the law of mortmain existing in any province in which they sought to acquire it, had not in view the special law of any one province, nor the question whether the prohibition was absolute, or only in the absence of the Crown's consent. The object was merely to point out that a corporation could only exercise its powers subject to the law of the province, whatever it might be, in this respect.

It was argued that the judgment of the Court of Queen's Bench might be sustained by the part of the prayer which asked that the company "be prohibited from acting in future as a corporation within the Province of Quebec" for certain purposes. But the prohibition is asked as consequential upon the declarations prayed for, and when these are refused, there are not only no declarations, but no allegations in the petition to sustain it. It has been seen that the prohibition contained in the judgment of the Court of Queen's Bench is not an injunction limited to restraining the company from doing specified acts in violation of particular laws of the province, but is a general prohibition founded on a declaration introduced by the court, other than those prayed for, that the company has no right to act as a corporation in dealing with lands and buildings, and certain other matters within the province. This declaration, with the prohibition founded on it, is obviously too extensive. A prohibition in these wide and sweeping terms would prohibit the company from acquiring or dealing in lands, though it had the Crown's consent, and could only be warranted by affirming the invalidity of the Act of Incorporation, which would be opposed to what has been stated in the previous part of this judgment to be their Lordships' view; or at least by affirming that the company in exercising its powers in the province, must necessarily violate provincial law which as already shown, is not a necessary consequence.

In the result, their Lordships will humbly advise Her Majesty to reverse the judgment under appeal, and to order that the judgment of the Superior Court be affirmed, and that the present Appellant's costs of the appeal to the Court of Queen's Bench in Canada be paid by the present Respondent. The Appellant must also have the costs of the appeal to Her Majesty.

*Railways.***WESTERN COUNTIES RAILWAY COMPANY v. WINDSOR AND ANNAPOLIS RAILWAY COMPANY ¹**

23. Under the British North America Act, 1867, sec. 108, taken in connection with the 3rd schedule thereto, all railways, belonging to the province of Nova Scotia, passed to and became vested in the Dominion of Canada, on the 1st

¹ Nova Scotia, 1882 Feb. 22, L. R. VII Appeal Cases 178.

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of July 1867; but not for any other or larger interest therein than at that date belonged to the province.

Temperance.

RUSSELL v. THE QUEEN ¹

24. The Canada Temperance Act, 1878, prohibiting, where it is put in force, uniformly in the Dominion, the sale of intoxicating liquors, regulating the traffic in excepted cases, and making the violation of the act a criminal offense, is within the legislative competence of the Dominion Parliament.

SIR MONTAGUE E. SMITH, p. 836: — His Lordship first referred to the above cause of the *Citizens Insurance Company v. Parsons*.

P. 839: — Laws of this nature designed for the promotion of public safety, order or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the parliament of Canada. It was said in the course of the judgment of this Board in the case of the *Citizens Insurance Company v. Parsons*, that the two sections (91 and 92) must be read together, and the language of one interpreted and, where necessary, modified by that of the other. Few, if any laws could be made by parliament for the peace, order, and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have been intended, when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it. The true nature and character of the legislation in the particular instance under discussion must be determined, in order to ascertain the class of subject to which it really belongs.....

Escheats.

ATTORNEY GENERAL OF ONTARIO v. MERCER ²

25. Lands in Canada escheated to the crown in default of heirs belong to the province in which they are situated, and not to the Federal government.

26. At the date of passing the British North America Act, 1867, the revenue arising from all escheats to the crown within the then province of Canada was subject to the disposal and appropriation of the Canadian legislature, and not

¹ New-Brunswick, 1882 June 23, L. R. VII Appeal Cases 829.

² S. C. Canada, 1883 July 18, L. R. VIII Appeal Cases 767.

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to the crown. Although sect. 102 of the act imposed upon the Dominion the charge of the general public revenue as then existing of the provinces; yet by sect. 109 the casual revenue arising from lands escheated to the crown after the Union was reserved to the provinces.

27. The words "lands, mines, minerals, and royalties," include, according to their true construction, royalties in respect of lands, such as escheats.

*License.***HODGE V. THE QUEEN ¹**

28. The Liquor License Act, 1877, which gives power to make, through a Board of Commissioners, regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., does not in respect of those sections interfere with "the general regulation of trade or commerce," but comes within Nos. 8, 15, and 16, of sect. 92 of the Act of 1867, and is within the power of the provincial legislature.

29. The "imposition of fines by imprisonment for enforcing any laws," in the British North America Act, includes the power to impose its usual accompaniment "hard labor"; and the provincial legislature having authority to impose imprisonment, with or without hard labor, has also power to delegate similar authority to the municipal body created by it, called the License Commissioners.

30. The provincial legislature which has so delegated its powers has the right to destroy what it has made, and create another agency, or take the matter directly into its own hands.

31. Subjects which in one aspect and for one purpose fall within sect. 92 of the British North America Act, 1867, may in another aspect and for another purpose fall within sect. 91.

The principles of the cases of *The Citizens Insurance Company of Canada v. Parsons* and *Russell v. The Queen* were acted upon.

SIR BARNES PEACOCK, p. 131: — Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., licensed for the sale of liquors by retail, and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with

¹ Ontario, 1883 Dec. 15, L. R. IX Appeal Cases 117.

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the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted.

P. 132: — When the B. N. A. Act, 1863, enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the Local Legislature is supreme and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect

P. 133: — Under these very general terms, "the imposition of punishment by imprisonment for enforcing any law," it seems to their Lordships that there is imported an authority to add to the confinement or restraint in prison that which is generally incident to it — "hard labour"; in other words, that "imprisonment" there means restraint by confinement in a prison, with or without its usual accompaniment, "hard labour."

The Provincial Legislature having thus the authority to impose imprisonment, with or without hard labour, had also power to delegate similar authority to the municipal body which it created, called the License Commissioners.

It is said, however, that the Legislature did not delegate such powers to the License Commissioners, and that therefore the resolution imposing hard labour is void for excess. It seems to their Lordships that this objection is not well founded.

In the first place, by sec. 5 of the Liquor License Act, the Commissioners may impose penalties. Whether the word "penalty" is well adapted to include imprisonment may be questioned, but in this Act it is so used, for sec. 52 imposes on offenders against the provisions of sec. 43 a penalty of 20 dollars or 15 days' imprisonment, and for a fourth offence a penalty of imprisonment with hard labour only. "Penalty" here seems to be used in its wider sense as equivalent to punishment. It is observable that in sec. 59, where recovery of penalties is dealt with, the Act speaks of "penalties in money." But, supposing that the "penalty" is to be confined to pecuniary penalties, those penalties may, by sec. 70, be recovered and enforced in the manner, and to the extent, that by-laws of municipals councils may be enforced under the authority of the Municipal Act. The word "recover" is an apt word for pecuniary remedies, and the word "enforce" for remedies against the person.

Turning to the Municipal Act, we find that, by sect. 454, municipal councils may pass by-laws for inflicting reasonable fines and penalties

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for the breach of any by-laws, and for inflicting reasonable punishment by imprisonment, with or without hard labour, for the breach of any by-laws in case the fine cannot be recovered. By secs. 400 to 402 it is provided that fines and penalties may be recovered and enforced by summary conviction before a justice of the peace, and that where the prosecution is for an offence against a municipal by-law the justice may award the whole or such part of the penalty or punishment imposed by the by-law as he thinks fit; and that, if there is no distress found out of which a pecuniary penalty can be levied, the justice may commit the offender to prison for the term, or some part thereof specified in the by-law. If these by-laws are to be enforced at all by fine or imprisonment, it is necessary that they should specify some amount of fine and some term of imprisonment.

The Liquor License Act then gives to the Commissioners either power to impose a penalty against the person directly or power to impose a money penalty, which, when imposed, may be enforced according to secs. 454 and 400-2 of the Municipal Act. In either case, the Municipal Act must be read to find the manner of enforcing the penalty, and the extent to which it may be enforced. The most reasonable way of construing statutes so framed is to read into the later one the passages of the former which are referred to. So reading these two statutes, the Commissioners have the same power of enforcing the penalties they impose as the Councils have of enforcing their by-laws, whether they can impose penalties against the person directly, or only indirectly as the means of enforcing money penalties. In either case, their resolution must, in order to give the magistrate jurisdiction, specify the amount of punishment. In either case, their resolution now under discussion is altogether within the powers conferred on them.

Their Lordships do not think it necessary or useful to advert to some minor points of discussion, and are, on the whole, of opinion that the decision of the Court of Appeal of Ontario should be affirmed, and this appeal dismissed, with costs, and will so humbly advise Her Majesty.

Stamps on court exhibits.

ATTORNEY GENERAL FOR QUEBEC V. REED ¹

32. The statute of Quebec, 43 and 44 Vict., ch. 9, which imposed a duty of ten cents upon every exhibit, filed in court in any proceeding, is *ultra vires* of the provincial legislature and unconstitutional, as being an indirect taxation not within the powers of a provincial legislature.

EARL OF SELBORNE, L. C., p. 143:—What is the meaning of the words "direct taxation?"

Now, it seems to their Lordships that those words must be understood with some reference to the common understanding of them which prevail among those who had treated more or less scientifi-

¹ S. C. Canada, 26 Nov. 1884, L. R. X Appeal Cases 141.

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cally such subjects before the act was passed. Among those writers we find some divergence of view. The view of Mill, and those who agree with him, is less unfavourable to the appellant's arguments than the other view, that of Mr. McCulloch and Mr. Littré. It is, that you are to look to the ultimate incidence of the taxation as compared with the moment of time at which it is to be paid; that a direct tax is—in the words which are printed here from Mr. Mill's book on political economy—"one which is demanded from the very persons who it is intended or desired should pay it." And then the converse definition of indirect taxes is, "those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

Well, now, taking the first part of that definition, can it be said that a tax of this nature, a stamp duty in the nature of a fee payable upon a step of a proceeding in the administration of justice, is one which is demanded from the very person who it is intended or desired should pay it? It must be paid in the course of the legal proceeding, whether that is of a friendly or of a litigious nature. It must, unless in the case of the last and final proceeding after judgment, be paid when the ultimate termination of those proceedings is uncertain; and from the very nature of such proceedings, until they terminate, as a rule, and speaking generally, the ultimate incidence of such a payment cannot be ascertained. In many proceedings of a friendly character the person who pays it may be a trustee, an administrator, a person who will have to be indemnified by somebody else afterwards. In most proceedings of a contentious character the person who pays it is a litigant expecting or hoping for success in the suit; and, whether he or his adversary will have to pay it in the end, must depend upon the ultimate termination of the controversy between them. The legislature, in imposing the tax, cannot have in contemplation, one way or the other, the ultimate determination of the suit, or the final incidence of the burden, whether upon the person who had to pay it at the moment when it was exigible, or upon any one else. Therefore it cannot be a tax demanded "from the very person who it is intended or desired should pay it;" for in truth that is a matter of absolute indifference to the intention of the legislature. And, on the other hand, so far as relates to the knowledge which it is possible to have in a general way of the position of things at such a moment of time, it may be assumed that the person who pays it is in the expectation and intention that he may be indemnified; and that the law which enacts it cannot assume, that that expectation and intention may not be realized. As in all other cases of indirect taxation, in particular instances, by particular bargains and arrangements of individuals, that which is the generally presumable incidence may be altered. An importer may be himself a consumer. When a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements between the parties determining who shall bear it. The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment;

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and if at the time the ultimate incidence is uncertain, then, as it appears to their Lordships it cannot, in this view, be called direct taxation within the meaning of the 2nd section of the 92nd clause of the Act in question. Still less can it be called so, if the other view, that of Mr. McCulloch, is correct.

Quere whether the law would not have been within the rule 14, if a special fund had been created by a provincial act for the maintenance of the administration of justice in the provincial courts with the revenue of the imposition of this tax?

*Criminal law.*RIEL V. THE QUEEN¹

33. The federal statute 43 Vict., ch. 25, which organizes the administration of justice in civil and in criminal matters in the North West Territories of Canada is constitutional, and covers crimes in the nature of high treason.

34. The authority of the federal parliament to pass such statute is derived from the imperial statute, 34 and 35 Vict., ch. 28, which enacts that "the parliament of Canada may from time to time make provision for the administration, peace, order and good government of any territory not for the time being included in any province."

LORD HALSBURY, p. 678:—The first point is that the act itself under which the petitioner was tried was *ultra vires* of the Dominion Parliament to enact. That Parliament derived its authority for the passing of the statute from the Imperial Statute, 34 and 35 Vict., cap. 28, which enacts that "the Parliament of Canada may from time to time make provision for the administration, peace, order and good government of any territory not for the time being included in any province." It is not denied that the place in question was one in respect of which the Parliament of Canada was authorized to make such provisions, but it appears to be suggested that any provisions differing from the provisions which in this country have been made for administration, peace, order and good government, cannot, as matter of law, be provisions for peace, order and good government in the territory to which the statute relates; and, further, that if a court of law should come to the conclusion that a particular enactment was not calculated as a matter of fact and policy to secure peace, order and good government, they would be entitled to regard any statute directed to those objects, but which the court might think likely to fail of that effect, as *ultra vires* and beyond the competency of the Dominion Parliament to enact. Their Lordships are of opinion that there is not the least color for such a contention. The words of the statute are sufficient to authorize the utmost discretion of enactment for the attainment of the objects pointed to. They are words under which the widest departure from criminal procedure, as it is known and practised in this country, has

¹ Manitoba, 22 Oct. 1885, L. R. 10 Appeal Cases 675.

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been authorized in Her Majesty's Indian Empire. Forms of procedure unknown to the English common law have there been established and acted upon, and to throw the least doubt upon the validity of powers conveyed by those words would be of widely mischievous consequence. Upon the construction of the Canadian Statute, 43 Vict., cap. 25, there was, indeed, a contention that high treason was not included in the words "any other crimes," but it is too clear for argument, even without the assistance afforded by the tenth section, that the Dominion Legislature did contemplate the commission of high treason as within the orbit of the jurisdiction they were creating.

Tax on corporations.

THE MERCHANTS' BANK OF CANADA, THE CANADIAN BANK OF COMMERCE, THE NORTH BRITISH MERCANTILE INSURANCE COMPANY, THE BANK OF TORONTO V. LAMBE¹

35. A tax imposed upon banks or other corporations which carry on business within the province, varying in amount with the paid-up capital and with the number of its offices, whether or not their principal place of business is within the province, is direct taxation within clause 2 of sect. 92 of the British North America Act, 1867, the meaning of which is not restricted in this respect by clauses 2, 3, or 15 of sect. 91.

36. The constitutionality of the provincial Act, 45 Vict., ch. 22, was, according to this principle, upheld.

LORD HOBHOUSE, p. 521:—These appeals raise one of the many difficult questions which have come up for judicial discussion under those provisions of the British North America Act (1867) which apportion legislative powers between the parliament of the Dominion and the legislatures of the provinces. It is undoubtedly a case of great constitutional importance, and the appellants' counsel earnestly impressed upon their Lordships. But questions of this class have been left for the decision of the ordinary courts of law, who must treat the provisions of the act in question by the same methods of construction and exposition which they applied to other statutes.

A number of incorporated banks are resisting payment of a tax imposed by the legislature of Quebec, and four of them are the present appellants. Dealing first with the case of the Bank of Toronto, which was argued first,—in the year 1882 the Quebec legislature passed a statute intitled "An act to impose certain direct taxes on certain commercial corporations," by which it was enacted that every bank carrying on the business of banking in the Province, every insurance company accepting risks and transacting the business of insurance in the province, every incorporated company carrying on any labor, trade or business in the province, and a

¹ Quebec, 1887 July 9. L. R. XII Appeal Cases 575.

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number of other specified companies, should annually pay the several taxes thereby imposed upon them. In the case of banks the tax imposed was a sum varying with the paid up capital, and an additional sum for each office or place of business.

The appellant bank was incorporated in the year 1855 by an act of the parliament of Canada. Its principal place of business is at Toronto, but it has an agency at Montreal. Its capital is said to be kept at Toronto, from whence are transmitted the funds necessary to carry on the business at Montreal. The amount of its capital at present belonging to persons resident in the province of Quebec, and the amount disposable for the Montreal agency, are respectively much less than the amount disposable elsewhere.

The bank resisted payment of the tax in question on the ground that the Quebec legislature had no power to pass the statute which imposed it. Mr. Justice Rainville, sitting in the Superior Court, took that view, and dismissed an action brought by the government officer, who is the present respondent. The Court of Queen's Bench, by a majority of three judges to two, took the contrary view, and gave the then appellant (the present respondent) a decree. The case comes on appeal from that decree of the Court of Queen's Bench.

The principal grounds on which the Superior Court rested its judgment are as follows:—That the tax was an indirect one; that it was not imposed within the limits of the province; that the parliament had exclusive power to regulate banks; that the provincial legislature could tax only that which existed by their authority, or was introduced by their permission; and that if the power to tax such banks as this existed, they would be crushed by it and so the power of the parliament to create them would be nullified.

The grounds stated in the decree of the Queen's Bench are two, viz: That the tax was direct, and that it was also a matter of a merely local or private nature in the province, and so fell within clause 16 of provincial legislation.

It was contended at the bar that the provincial legislature could tax only that which existed on their authority or permission, and when the appellants' counsel were proceeding to argue that the tax did not fall within clause 16, their Lordships intimated that they would prefer to hear first what could be said in favour of the opposite view. All the other grounds had been argued very fully and very ably at the bar. To ascertain whether or not the tax was lawfully imposed, it will be best to follow the method of inquiry adopted in other cases. First, does it fall within the description of taxation allowed by class 2 of section 42 of the Federation act, viz: "Direct taxation within the province in order to the raising of a revenue for provincial purposes?" Secondly, if it does, are we compelled by anything in section 91, or in the other parts of the act, so to cut down the full meaning of the words of section 92 that they should not cover this tax?

First, is this tax a direct tax? For the argument of this question the opinions of a great many writers on political economy were cited; and it is quite proper—or, rather, necessary—to have careful regard to such opinions. But it must not be forgotten that the question is a

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legal one, viz., what the words mean as used in this statute; whereas economists were always seeking to trace the effect of taxation, throughout the community, and were apt to use the words "direct" and "indirect" according as they found the burden of a tax abided more or less with the person who first paid it. This distinction was illustrated very clearly by quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving this test of direct and indirect taxation, made remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

After some consideration, Mr. Kerr chose the definition of John Stuart Mill as the one he would prefer to abide by. That definition is as follows: "Taxes are either direct or indirect. A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs. The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a particular contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."

It was said that Mill added a term, that to be strictly direct a tax must be general; and this condition was much pressed at the bar. Their Lordships have not thought it necessary to examine Mill's work for the purpose of ascertaining precisely what he does say on this point; nor would they presume to say whether for economical purposes such a condition is sound or unsound; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

Their Lordships would take Mill's definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the appellants' counsel, nor only because it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them

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to embody with sufficient accuracy for this purpose an understanding of the most obvious *indicia* of direct and indirect taxation, which was a common understanding, and was likely to have been present to the minds of those who passed the Federal Act.

Now whether the probabilities of the case or the frame of the Quebec Act are considered, it appears to their Lordships that the Quebec legislature must have intended and desired that the very corporations from whom the tax is demanded should pay and finally bear it. It is carefully designed for that purpose. It is not like a customs duty which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. All scientific economists teach that it is paid, and scientific financiers intend that it shall be paid, by the consumer and even those who do not accept the conclusions of the economists maintain that it is paid, and intended to be paid, by the foreign producer. Nobody thinks that it is, or intends that it shall be paid by the importer from whom it is demanded. But the tax now in question is demanded directly of the bank apparently for the reasonable purpose of getting contributions for provincial purposes from those who are making profits by provincial business. It is not a tax on any commodity which the bank deals in and can sell at an enhanced price to its customers. It is not a tax on its profits, nor on its several transactions. It is a direct lump sum, to be assessed by simple reference to its paid up capital and its places of business. It may possibly happen that in the intricacies of mercantile dealings, the bank may find a way to recoup itself out of the pockets of its Quebec customers. But the way must be an obscure and circuitous one, the amount of recoupment cannot bear any direct relation to the amount of tax paid, and if the bank does manage it, the result will not improbably disappoint the intention and desire of the Quebec government.

For these reasons their Lordships hold the tax to be direct taxation within class 2 of section 92 of the Federation act. There is nothing in the previous decisions on the questions of direct taxation adverse to this view. In the case of *Attorney General for Quebec pro Regina* and *The Queen Insurance Company*, 3 Appeal Cases 1090, the disputed tax was imposed under cover of a license to be taken out by the insurers; but nothing was to be paid directly on the license, nor was any penalty imposed upon failure to take one. The price of the license was to be a percentage on the premiums received for insurances, each of which was stamped accordingly. Such a tax would fall within any definition of indirect taxation, and the form given to it was apparently with the view of bringing it under class 9 of section 92, which related to licenses. In *Attorney General for Quebec and Reed*, 10 Appeal Cases 141, the tax was a stamp duty on exhibits produced in courts of law, which in a great many, perhaps most instances, would certainly not be paid by the person first chargeable with it. In *Severn and The Queen*, 2 Supreme Court of Canada, page 70, the tax in question was one for licenses, which by a law of the Legislature of Ontario were required to be taken for dealing in liquors, and the Supreme court held the law to be *ultra vires*, mainly

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on the grounds that such licenses did not fall within class 9 of section 92, and they were in conflict with the powers of Parliament under class 2 of section 91. It is true that all the judges expressed opinions that the tax, being a license duty, was not a direct tax. Their reasons did not clearly appear. But as the tax now in question is not, either in substance or in form, a license duty, further examination on that point is unnecessary.

The next question is whether the tax was taxation within the province. It was urged that the bank was a Toronto corporation, having its domicile there, and having its capital placed there; that the tax was on the capital of the bank, that it must therefore fall on a person or persons, or property, not within Quebec. The answer to that argument was that class 2 of section 92 did not require that the persons to be taxed by Quebec were domiciled, or even resident, in Quebec. Any person found within the province might legally be taxed there, if taxed directly. The bank was found to be carrying on business there, and on that ground alone it was taxed. There was no attempt to tax the capital of the bank any more than its profits. The bank itself was directly ordered to pay a sum of money; but the legislature had not chosen to tax every bank, small or large, alike; nor to leave the amount of tax to be ascertained by variable accounts, or any uncertain standard. It had adopted its own measure, either of that which it was just the banks should pay, or of that which they had the means to pay, and those things are ascertained by reference to facts which could be verified without doubt or delay. The banks were to pay so much, not according to their capital, but according to their paid-up capital, and so much on their place of business. Whether that method of assessing a tax be sound or unsound, wise or unwise, is a point on which their Lordships have no opinion, and are not called on to form one, for as it does not carry the taxation out of the province, it is for the legislature, and not for the courts of law, to judge of its expediency.

Then, is there anything in section 91 which operates to restrict the meaning ascribed to section 92? Clause 3 is certainly in literal conflict with it. It is impossible to give exclusively to the Dominion the whole subject of raising money by any mode of taxation, and at the same time to give to the provincial legislature exclusively, or at all, the power of direct taxation for provincial or other purposes. That very conflict between the two sections was noticed by way of illustration in *The Citizens Insurance Company* and *Parsons*, 2 Appeal Cases 96, where their Lordships said: "So, the raising of money by any mode or system of taxation, is enumerated among the classes of subjects in section 91; but, though the description is sufficiently large to include direct taxation within the province in order to the raising of a revenue for provincial purposes, assigned to the provincial legislatures by section 92, it obviously could not have been intended that in this instance also the general power should override the particular one." Their Lordships adhere to that view, and hold that, as regards direct taxation within the province to raise money for provincial purposes, the subject falls wholly within the jurisdiction of the provincial legislature.

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It was earnestly contended that the taxation of banks would unduly cut down the powers of Parliament in relation to matters falling within class 2, viz., the regulation of trade and commerce, and within class 15, viz., banking and the incorporating of banks. Their Lordships think that contention gives far too wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the province, where they carry on business, can interfere at all with the power of making laws on the subject of banking or with the power of incorporating banks. The words, "Regulation of trade and commerce," were, indeed, very wide, and in *Severn's* case it was the view of the Supreme court that they operated to invalidate the license duty, which was there in question. But since that case was decided the question has been more completely sifted before the Committee in *Parson's* case, 7 App. Ca., and it is absolutely necessary that the literal meaning of the words should be restricted in order to afford scope for powers which were given exclusively to the Provincial Legislature. It was there thrown out that the power of regulation given to the Parliament meant some general or inter-Provincial regulations. No further attempt to define the subject need now be made, because their Lordships are clear that if they were to hold that this power of regulation prohibited any Provincial taxation on the person or things regulated, so far from restricting the expressions, as we found necessary in *Parson's* case, they would be straining them to their widest conceivable extent.

Then it was suggested that the Legislature might lay on taxes so heavy as to crush the banks out of existence, and so nullify the power of Parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. There are obvious reasons for confining their power to direct taxes and licenses, because the power of indirect taxation would be felt all over the Dominion, but whatever power falls within the legitimate meaning of Classes 2 and 9 is in their Lordships' judgment what the Imperial Parliament intended to give; and to place a limit on it because the power might be used unwisely, as all powers might, would be an error and would lead to insuperable difficulties in the construction of the federation act.

Their Lordships were invited to take a wide range of this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case, but he was dealing with the constitution of the United States. Under that constitution, as their Lordships understand, each State could make laws for itself uncontrolled by the Federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution Chief Justice Marshall found one of those limits at the point at which the action

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of the State Legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the Provincial Legislatures under section 92 which might by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under section 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament, which made an elaborate distribution of the whole field of legislative authority between legislative bodies, and, at the same time, provided for the federated provinces a carefully balanced constitution under which no one of the parts could pass laws for itself except under the control of the whole, acting through the Governor-General, and the question they had to answer was whether the one body or the other had power to make a good law. If they found that on the construction of the act a legislative power fell within section 92, it would be quite wrong of them to deny its existence, because by some possibility it might be abused, or might limit the range which otherwise would be open to the Dominion Parliament.

It only remains to refer to some of the grounds taken by the learned judges of the lower courts, which were strongly objected to at the bar. Great importance was attached to French authorities, who laid down that the *impôt des patentes*, which was a tax on trades, and which might possibly have afforded hints for the Quebec law, was a direct tax. And it was suggested that the provincial legislatures possessed powers of legislation, either inherent in them or dating from a time anterior to the Federation Act, and not taken away by that act. Their Lordships had not thought it necessary to call on the respondent's counsel, and therefore possibly had not heard all that might be said in support of such views; but the judgments below were so carefully reasoned, and the citation and discussion of them had been so full and elaborate, that their Lordships felt justified in expressing their present dissent on these points. They could not think that the French authorities were useful for anything but illustration, and they adhere to the view which has always been taken by this committee, that the Federation Act exhausted the whole range of legislative power, and that whatever was not thereby given to the Provincial Legislatures rested with Parliament. The result is that, though not wholly for the same reasons, their Lordships agree with the Court of Queen's Bench and they will humbly advise Her Majesty to affirm their decree and dismiss the appeal of the Bank of Toronto.

The other three cases possess no points of distinction in favor of the appellants. That of the Canadian Bank of Commerce is exactly parallel. The Merchants Bank of Canada has its principal place of business in Montreal, and to that extent loses the benefit of one of the arguments urged in favor of the other banks. The insurance company is taxed to a sum specified by the Quebec Act, and not with reference to its capital, and so loses the benefit of one of the arguments urged in favor of the banks. The cases have been treated

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as substantially identical in the courts below, and their Lordships will take the same course with respect to all of them. The applicants in each case must pay the costs of appeal.

*Indian lands***ST. CATHERINE'S MILLING AND LUMBER COMPANY V. THE QUEEN¹**

37. By royal proclamation, in 1763, possession was granted to certain Indian tribes of such lands, "parts of our dominions and territories," as, not having been ceded to or purchased by the crown, were reserved, "for the present," to them as their hunting grounds. The proclamation further enacted that all purchases from the Indians of lands reserved to them must be made on behalf of the crown by the governor of the colony in which the lands lie, and not by any private person.

38. In 1873, the lands in suit, situated in Ontario, which had been in Indian occupation until that date, under the said proclamation, were, to the extent of the whole right and title of the Indian inhabitants therein, surrendered to the government of the Dominion for the crown, subject to a certain qualified privilege of hunting and fishing.

Under these circumstances, their Lordships held that by force of the proclamation, the tenure of the Indians was a personal and usufructuary right dependent upon the good will of the crown; that the lands were thereby, and at the time of the union, vested in the crown, subject to the title, which was "an interest other than that of the Province in the same," within the meaning of sect. 109 of the British North America Act, 1867.

39. And also, that by force of the said surrender the entire beneficial interest in the lands subject to the privilege was transmitted to the province in terms of sect. 109. The Dominion power of legislation over lands reserved for the Indians being not inconsistent with the beneficial interest of the province therein.

*Precious metals.***ATTORNEY GENERAL OF BRITISH COLUMBIA V. ATTORNEY
GENERAL OF CANADA²**

40. A conveyance by the province of British Columbia to the Dominion of "public lands," being in substance an assignment of its right to appropriate the territorial revenues

¹ S. C. Ontario, 1888 Dec. 12, L. R. XIV Appeal Cases 46.

² S. C. Canada, 1888 April 3, L. R. XIV Appeal Cases 295.

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arising therefrom, does not imply any transfer of its interest in revenues arising from the prerogative rights of the crown. The precious metals in, upon, and under such lands are not incidents of the land but belong to the crown, and, under sect. 109 of the British North America Act, 1867, beneficially to the province, and an intention to transfer them must be expressed or necessarily implied.

LORD WATSON, p. 302:—According to the law of England, gold and silver mines until they have been aptly severed from the title of the crown, and vested in a subject, are not regarded as *partes soli*, or as incidents of the land in which they are found. Not only so, but the right of crown to land, and the baser metals which it contains, stands upon a different title from that to which its right to the precious metals must be ascribed. In the *Mines Cases*¹ all the justices and barons agreed that, in the case of the baser metals, no prerogative is given to the crown; whereas “all mines of gold and silver within the realm, whether they be in the lands of the Queen or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore. See above *Attorney General of Ontario v. Mercer*.

FIRE MARSHALL. See *iisdem verbis*.

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BEAUMONT V. BARRETT²

41. The power of summarily punishing contempts is inherent in every assembly possessing a supreme legislative authority; whether they are such as tend directly to obstruct their proceedings, or indirectly to bring their authority into contempt.

MR. BARON PARKE, p. 76:—I think it to be inherent in every assembly that possesses a supreme legislative authority, to have the power of punishing contempts, and not merely such as are a direct obstruction to its due course of proceeding, but such also as have a tendency indirectly to produce such an obstruction, in the same way as Courts of Record may not only remove or punish persons who actually are interrupting their functions, but may also repress those who indirectly impede the administration of justice, by disparaging and weakening their authority. The language of Lord Ellenborough on this subject, as reported in the case of *Burdett v. Abbott* (14 East 137) in which his Lordship in speaking of the powers belonging to the House of Commons, is very apposite to the present inquiry:—“The privileges which have been since enjoyed,” says his Lordship, “and the functions which have been since uniformly exercised by each branch of the legislature, with the knowledge and

¹ 1 Plowd 336.

² Jamaica, 1836 June 17, 1 Moore 59.

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acquiescence of the other House, and of the King, must be presumed to be the privileges and functions which then, that is, at the very period of their original separation, were statutorily assigned to each. The privileges which belong to them seem at all times to have been, and necessarily must be, inherent in them, independent of any precedent; it was necessary that they should have the most complete personal security to enable them freely to meet for the purpose of discharging their important functions; and also that they should have the right of *self-protection*; I do not mean merely against acts of individual wrong, for poor and impotent indeed would be the privileges of Parliament, if they could not also protect themselves against injuries and affronts offered to the aggregate body, which might prevent or impede the full and effectual exercise of their parliamentary functions. This is an essential right, necessarily inherent in the Supreme Legislature of the Kingdom, and of course as necessarily inherent in the Parliament assembled in the two Houses as in one. The right of self-protection implies, as a consequence, a right to use the necessary means for rendering such self-protection effectual. Independently, therefore, of any precedents or recognized practice on the subject, such a body must *a priori* be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever these functions might be. On this ground it has been, I believe, very generally admitted in argument, that the House of Commons must be, and is authorized to remove any immediate obstructions to the due course of its proceedings. But this mere power of removing actual impediments to its proceedings would not be sufficient for the purposes of its full and efficient protection; it must also have the power of protecting itself from insult and indignity wherever offered, by punishing those who offer it. Can the High Court of Parliament, or either of the two Houses of which it consists, be deemed not to possess intrinsically that authority of punishing summarily for contempts, which is acknowledged to belong, and is daily exercised as belonging to every superior court of law of less dignity undoubtedly than itself?"

Now, if we apply that principle to this legislative body, which appears to possess supreme legislative authority over the whole of the island and its dependencies, we must in like manner say, that they have incidentally the power not only of punishing direct impediments to their proceedings, but indirect obstructions, such as are caused by libels reflecting on their conduct, and tending to bring their authority into contempt, and that independently of any precedent for its exercise.

KIELLEY v. CARSON *et al*¹

42. The above doctrine established in *Beaumont v. Barrett* was modified in this case, where the Judicial Committee held that a House of Assembly in a settled colony does not possess, as a legal incident, the power of arrest, with a view of adjudication on a contempt

¹ Newfoundland, 1842 May 23, IV Moore 63.

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committed out of the assembly, although the House possesses such powers as are reasonably necessary for the proper exercise of its functions and duties and the protection against all impediments to the due course of its proceedings.

43. Their Lordships in rendering the judgment in this appeal declared that they did not consider the case of *Beaumont v. Barrett* as one by which they ought to be bound in deciding the present question. The opinion of their Lordships in this latter case was delivered immediately after the argument was closed. And although it clearly expressed that the power of punishing contempts was incidental to every legislative assembly, this was not the only ground on which that judgment was rested, and therefore, was in some degree extra-judicial. Besides, it was stated to be and was founded entirely on the *dictum* of Lord Ellenborough in *Burdett v. Abbott*,¹ which *dictum* they all think could not be taken as an authority for the abstract proposition, that every legislative body has the power of committing for contempt. The observation was made by the judge who delivered the judgment, with reference to the peculiar powers of parliament, but ought not to be extended any further.

MR. BARON PARKE, p. 88 :—The whole question then is reduced to this, whether by law, the power of committing for a contempt, not in the presence of the assembly, is incidental to every local legislature.

The Statute Law on this subject being silent, the Common Law is to govern it; and what is the Common Law, depends upon principle and precedent.

Their Lordships see no reason to think, that in the principle of the Common Law, any other powers are given them, than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment, an act which on both sides, it is admitted, it was competent for the crown to perform. This is the principle which governs all legal incidents, "*Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest.*" In conformity to this principle we feel no doubt that such an assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their legislative functions, they are justified in acting by the principle of the common law. But the power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the

¹ 14 East 137.

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measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions.

These powers certainly do not exist in corporate or other bodies, assembled, with authority, to make by-laws for the government of particular trades, or united numbers of individuals. The functions of a Colonial Legislature are of a higher character, and it is engaged in more important objects; but still there is no reason why it should possess the power in question.

It is said, however, that this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding that it belongs as a legal incident, by the Common Law, to an Assembly with analogous functions. But the reason why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo Parliamenti*, which forms a part of the Common Law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one.

His Lordship also remarked that it was not an argument that in some other colonies, the legislative assemblies exercise the power of committing for breach of privilege without objection, as the constitution and practice of the different colonies, and the prerogative of the crown with reference to that, differ so much, that there is very little analogy between them, and no inference can safely be deduced from the law, as understood in one, to guide the judges with respect to another. In some, the very exercise of the power, with the sanction of the tribunals, and the acquiescence of the public for a long period of time, may raise a presumption that the power has been duly communicated by law.

FENTON V. HAMPTON¹

44. The legislative council of *Van Dieman's Land* appointed a committee of their own body to inquire into certain alleged abuses in the convict department. The respondent was deemed a material and necessary witness and was summoned to appear personally before the select committee. The respondent without reasonable excuse, refused and neglected to appear. Thereupon the

¹ *Van Dieman's Land*, 1858 Feb. 4, XI Moore 347.

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legislative council being informed of these circumstances, issued another summons which was again disregarded; then the council resolved that the respondent was guilty of contempt and ordered its speaker to apprehend the respondent under a warrant and to keep him in his custody during the pleasure of the council. The respondent was accordingly arrested and this is the trespass complained of. The above case of *Kielly v. Carson* was reviewed and upheld.

45. The "*lex et consuetudo Parliamenti*" applies exclusively to the House of Lords and House of Commons, in *England*, and is not conferred upon a supreme legislative assembly of a colony, or settlement, by the introduction of the common law of England into the colony.

46. No distinction in this respect exists between colonial legislative councils and assemblies whose power is derived by grant from the crown, or created under the authority of an Act of the Imperial Parliament.

DOYLE V. FALCONER¹

47. The above cases of *Kielly v. Carson* and *Fenton v. Hampton* decide conclusively that legislative assemblies in the British colonies have, in the absence of express grant, no power to adjudicate upon, or punish for contempts when committed beyond their walls. The Privy Council maintained the same principle in this cause for contempt committed in its presence and by one of its members.

48. A member of the lower House of Assembly of *Dominica*, who had been taken into custody by the Serjeant at Arms, and committed to the common gaol, by virtue of the Speaker's warrant, for a contempt committed in the face of the Assembly, brought an action for trespass and false imprisonment, and obtained £770 as damages.

The Judicial Committee held on demurrer to pleas of justification, that the House of Assembly had no such power to commit and punish as had been assumed, and that the speaker and members were liable.

SIR JAMES W. COLVILLE, p. 217:—The first question, affecting as it does the privileges of the Legislative Assemblies, in many of the dependencies of the Crown, is one of importance. When it first arose before this committee, in the case of *Beaumont v. Barrett*, the learned judges then sitting decided broadly that the power of punishing contempts is inherent in every assembly that possesses a supreme legislative authority, whether they are such as are a direct obstruction to its due course of proceeding or such as have a tendency indirectly

¹ *Dominica*, 1866 Nov. 9, IV Moore N. S. 203.

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to produce such obstruction; and, therefore, that the Legislative Assembly of Jamaica had the power of imprisoning; for a contempt by the publication of a libel. Again, in America, the Supreme Court of the United States, a tribunal whose judgments are entitled to the highest respect, held, in the case of *Anderson v. Dunn* (¹), that the House of Representatives had, by necessary implication, a general power of punishing and committing for contempts, notwithstanding that the *lex scripta* "the constitution of the United States" had expressly conferred upon it a power limited to the punishment of contempts when committed by its own members.

It is admitted, however, that the case of *Kielly v. Carson*, which overruled that of *Beaumont v. Barrett*, and has been followed by that of *Fenton v. Hampton*, must here be taken to have decided conclusively that the legislative assemblies in the British colonies have, in the absence of express grant, no power to adjudicate upon, or punish for, contempts committed beyond their walls. The case is one which, having regard to the constitution of the committee before which it was argued for the second time, their Lordships must accept as an authority of singular weight. And if the elaborate judgment which was then pronounced has in terms left open the question which is raised in the present case, it has stated principles which go far to afford the means of determining that question.

The privileges of the House of Commons, that of punishing for contempt being one, belong to it, by virtue of the *lex et consuetudo Parliamenti*, which is a law peculiar to and inherent in the two Houses of Parliament of the United Kingdom. It cannot, therefore, be inferred from the possession of certain powers by the House of Commons, by virtue of that ancient usage and prescription, that the like powers belong to legislative assemblies of comparatively recent creation in the dependencies of the crown.

Again, there is no resemblance between a colonial House of Assembly, being a body which has no judicial functions, and a Court of Justice, being a Court of Record. There is, therefore, no ground for saying that the power of punishing for contempt, because it is admitted to be inherent in the one, must be taken by analogy to be inherent in the other.

If, then, the power assumed by the House of Assembly cannot be maintained by analogy to the privileges of the House of Commons, or the powers of a Court of Record, is there any other legal foundation upon which it may be rested? It has not, as both sides admit, been expressly granted. The learned counsel for the appellants invoked the principles of the common law, and as it must be conceded that the common law sanctions the exercise of the prerogative, by which the assembly has been created, the principle of the common law, which is embodied in the maxim, "*Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest*," applies to the body so created. The question, therefore, is reduced to this: Is the power to punish and commit for contempts committed in its presence one necessary to the existence of such a body as the assem-

¹ 6 Wheaton, Amer. Rep. 204.

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bly of Dominica, and the proper exercise of the functions which it is intended to execute? It is necessary to distinguish between a power to punish for a contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting, which last power is necessary for self-preservation. If a member of a Colonial House of Assembly is guilty of disorderly conduct in the House whilst sitting, he may be removed, or excluded for a time, or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another. The former is, in their Lordship's judgment, all that is warranted by the legal maxim that has been cited, but the latter is not its legitimate consequence. To the question, therefore, on which this case depends, their Lordships must answer in the negative. If the good sense and conduct of the members of colonial legislatures prove, as in the present case, insufficient to secure order and decency of debate, the law would sanction the use of that degree of force which might be necessary to remove the person offending from the place of meeting, and to keep him excluded. The same rule would apply, *a fortiori*, to obstructions caused by any person not a member. And whenever the violation of order amounts to a breach of the peace or other legal offence, recourse may be had to the ordinary tribunals.

It may be said that the dignity of an assembly exercising supreme legislative authority in a colony, however small, and the importance of its functions, require more efficient protection than that which has just been indicated; that it is unseemly or inconvenient to subject the proceedings of such a body to examination by the local tribunals, and that it is but reasonable to concede to it a power which belongs to every inferior Court of Record. On the other hand, it may be urged, with at least equal force, that the power contended for is of a high and peculiar character; that it is in derogation of the liberty of the subject, and carries with it the anomaly of making those who exercise it judges in their own cause, and judges from whom there is no appeal; and that if it may be safely entrusted to magistrates, who would all be personally responsible for any abuse of it to some higher authority, it might be very dangerous in the hands of a body which, from its very constitution, is practically irresponsible.

Their Lordships, however, are not at liberty to deal with considerations of this kind. There may or may not be good reasons for giving by express grant to such an assembly as this, privileges beyond those which are legally and essentially incident to it. In the present instance, this might have been done by the instrument creating the assembly, since Dominica was a conquered or ceded colony, and the introduction of the law of England seems to have been contemporaneous with the creation of the assembly. It may also be possible to enlarge the existing privileges of the assembly by an act of the local legislature, passed with the consent of the crown, since such an act seems to be within the 3rd section of the recent

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statute, 28th and 29th Vict., ch. 63. That extraordinary privileges of this kind, when regularly acquired, will be duly recognized here, is shown by the recent case of *Dill v. Murphy*.¹ But their Lordships, sitting as a court of justice, have to consider not what privileges the House of Assembly of Dominica ought to have, but what by law it has. In order to establish that the particular power claimed is one of those privileges, the appellants must show that it is essential to the existence of the assembly, an incident "*sine quo res ipsa esse non potest*." Their Lordships are of opinion that it is not such an incident.

THE SPEAKER OF THE LEGISLATIVE ASSEMBLY OF VICTORIA
V. GLASS²

49. The appellant having being declared by the House of Assembly of Victoria to have committed a contempt and breach of privilege, was arrested under the Speaker's warrant, which was in general terms, without specifying any specific offence. He was afterwards set free by the Supreme court in the colony on the ground that the constitution did not confer upon the legislative assembly the same powers, privileges, and immunities as are possessed by the House of Commons, although the constitution Act gave power to the assembly to commit by a general warrant for contempt and breach of privilege of that assembly.

50. The Judicial Committee held that the constitution Act gave to the assembly the same powers and privileges as the House of Commons had at the time of the passing of the said Act; and, that incident to those powers and privileges, there was vested in the legislative assembly the right of judging for itself what constituted a contempt, and of ordering the commitment to prison of persons adjudged by the House to have been guilty of a contempt and breach of privilege, by a general warrant, without setting forth the specific grounds of such commitment.

LORD CAIRNS, p. 465:—Beyond all doubt, one of the privileges and one of the most important privileges of the House of Commons is the privilege of committing for contempt; and incidental to that privilege, it has, as has already been stated been well established in this country that the House of Commons have the right to be the judges themselves of what is contempt, and to commit for that contempt by a warrant, stating that the commitment is for contempt of the House generally, without specifying what the character of the contempt is. It would, therefore, almost of necessity follow, that the Legislature of the colony having been permitted to carry over to the colony the privileges and powers of the House of Com-

¹ Moore's P. C. N. S. 487.

² Victoria, 1871 Jan. 31, VII Moore N. S. 419.

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mons, and having in terms carried over all the privileges and powers exercised by the House of Commons at the date of the statute, there was carried over to the Legislative Assembly of the colony the privilege or power of the House of Commons connected with contempt, the privilege or power, namely, of committing for contempt, of judging itself of what is contempt, and of committing for contempt by a warrant stating generally that a contempt had taken place. It has, however, been argued before us that the privilege is the privilege of committing for contempt merely; that the judging of contempt without appeal, and the power of committing by a general warrant, are mere incidents or accidents applicable to this country, and not transferred to the colony. Their Lordships are entirely unable to accede to this argument.

They consider that there is an essential difference between a privilege of committing for contempt such as would be enjoyed by an inferior court, namely, privilege of first determining for itself what is contempt, then of stating the character of the contempt upon a warrant, and then of having that warrant subjected to review by some superior tribunal, and running the chance whether that superior tribunal will agree or disagree with the determination of the inferior court, and the privilege of a body which determines for itself, without review, what is contempt, and acting upon the determination, commits for that contempt, without specifying upon the warrant the character or the nature of the contempt. The privileges, their Lordships think, as thus stated, are different. The latter of the two privileges is a higher and more important one than the former. The ingredients of judging the contempt, and committing by a general warrant, are perhaps the more important ingredients in the privileges which the House of Commons in this country possesses; and it would be strange indeed if under a power to transfer the whole of the privileges, immunities, and powers of the House of Commons, that which would only be a part, and a comparatively insignificant part of this privilege and power were transferred.

POWER OF SUSPENSION.BARTON V. TAYLOR¹

51. The powers incident to or inherent in a colonial legislative assembly are "such as are necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute," and do not extend to justify punitive action, or unconditional suspension of a member during the pleasure of the assembly.

52. The respondent having entered the chamber of the New South Wales assembly, of which he was a member, within a week after it had passed a resolution that he be "suspended from the service of the House," he was removed therefrom and prevented from re-entering it. In an

¹ N. S. Wales, 1886 March 6, L. R. XI Appeal Cases 197.

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action of trespass, it was decided that the resolution must not be construed as operating beyond the sitting during which the resolution was passed.

THE EARL OF SELBORNE, p. 202:—The intention of that plea seems to have been to justify the trespass on the ground of an inherent power in every colonial Legislative Assembly to protect itself against obstruction, interruption, or disturbance of its proceedings by the misconduct of any of its members in the course of those proceedings. The nature, grounds, and limits of that power (which undoubtedly exists) have been several times considered at this board, especially in the case of *Kielly v. Carson*, 4 Moore, P. C., 63, and *Doyle v. Falconer*, 1 L. R. P. C., p. 328. It results from those authorities that no powers of that kind are incident to or inherent in a colonial Legislative Assembly (without express grant), except "such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute", 4 Moore, P. C. 88. Whatever, in a reasonable sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority. For these purposes, protective and self-defensive powers only, and not punitive, are necessary. If the question is to be elucidated by analogy, that analogy is rather to be derived from other assemblies (not legislative), when incidental powers of self-protection are implied by the common law (although of inferior importance and dignity to bodies constituted for the purposes of public legislation) than from the British Parliament, which has its own peculiar law and customs, and from courts of record, which have also their special authorities and privileges, recognised by law. "If a member of a colonial House of Assembly is guilty of disorderly conduct in the House while sitting, he may be removed or excluded for a time, or even expelled. The right to remove for self-security, is one thing, the right to inflict punishment is another. If the good sense and conduct of the members of colonial Legislatures prove insufficient to secure order and decency of debate, the law would sanction the use of that degree of force which might be necessary to remove the person excluded from the place of meeting, and to keep him excluded." L. R. 1 P. C. 340.

Those words were used by Sir James Colville, when delivering the judgment of tribunal in *Doyle v. Falconer*,¹ and their Lordships adopt them.....

P. 204:—The principle on which the implied power is given confines it within the limits of what is required by the assumed necessity. That necessity appears to their Lordships to extend as far as the whole duration of the particular meeting or sitting of the assembly in the course of which the offence may have been committed. It seems to be reasonably necessary that some substantial interval should be interposed between the suspensory resolution and the resumption of his place in the assembly by the offender, in order to

¹ L. R. 1 P. C. 328.

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give opportunity for the subsidence of heat and passion, and for reflection on his own conduct by the person suspended; nor would anything less be generally sufficient for the vindication of the authority and dignity of the assembly The power, therefore, of suspending a member guilty of obstruction or disorderly conduct during the continuance of any current sitting, is, in their Lordships' judgment, reasonably necessary for the proper exercise of the functions of any Legislative Assembly of this kind; and it may very well be, that the same doctrine of reasonable necessity would authorize a suspension until submission or apology by the offending member, which, if he were refractory, might cause it to be prolonged (not by the arbitrary discretion of the assembly, but by his own wilful default) for some further time. If these are the limits of the inherent or implied power, reasonably deducible from the principle of general necessity, they have the advantage of drawing a simple practical line between defensive and punitive action on the part of the assembly. A power of unconditional suspension, for an indefinite time, or for a definite time depending only on the irresponsible discretion of the assembly itself, is more than the necessity of self-defence seems to require, and is dangerously liable, in possible cases, to excess or abuse.

LEGITIMATION

OF CHILDREN. See FILIATION, MARRIAGE: *iusdem verbis*.

LESSOR AND LESSEE**DESTRUCTION OF PREMISES.**

COUNTER V. MACPHERSON ¹

53. An agreement was made by which a landlord was to make certain repairs to a store already occupied by his tenant and to build for his use a warehouse; all to be ready at a certain date, viz., the first of April 1840; and then the tenant was to sign a lease of them for five years. On the first of April 1840, the repairs were not finished and the warehouse was half done, but the tenant waived his right to have the agreement set aside, and consented to wait until the works should be at an end. But on the 18th of April the premises were accidentally destroyed by fire. The landlord took an action for specific performance of the agreement, and to compel the defendant to rebuild the premises and sign a lease for five years. The tenant contended that he could not be forced to take a lease under the circumstances, and that he was not responsible for the accident. The action was maintained in the court for the first instance, dismissed in appeal; and this last judgment was confirmed by the Judicial Committee.

¹ Upper Canada, 1845 Feb. 12, V Moore 83.

DISTRESS FOR RENT.RAILTON V. WOOD¹

54. In *New South Wales*, under the Insolvent Act, 5 Vict., No. 17, s. 41, no distress for rent can be levied or proceeded in after any order in insolvency has been made, but the provision only applies to a distress upon goods forming part of the insolvent assets.

55. It was held that this prohibition does not authorize the purchaser of the goods, under a bill of sale anterior to the distress, to take them out of the hands of the landlord's bailiff who had impounded and made an inventory of them. See STATUTE: *construction, same cause.*

IMPROVEMENTS MADE BY LESSEE.PLIMMER V. MAYOR, COUNCILLORS AND CITIZENS
OF THE CITY OF WELLINGTON²

56. The appellant, lessee of a piece of land from the government, with the permission and encouragement of this latter, had built a wharf and jetty on it, which the government had used in common with the appellant. The land having been transferred to the respondent, it was held that the appellant was entitled to compensation.

57. The principle applied was thus laid down from a citation of Lord Kingsdown, in *Ramsden v. Dyson*, *Law Rep.*, 3 H. L. 129:—"If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectations." *Gregory v. Mitchell*, 18 Ves. 328; *Pilling v. Armitage*, 12 Ves. 78; *Duke of Beaufort v. Patrick*, 17 Beav. 60; *Dillwyn v. Llewelyn*, 4 D. F. & J. 517; *Unity Bank v. King*, 25 Beav. 72; *Winter v. Brockwell*, 8 East 308; *Liggins v. Juge*, 7 Bing 682.

RIGHT TO QUARRY. See PROPRIETOR: *iisdem verbis.*

RIGHT OF TENANT IN SALE. See SALE: *iisdem verbis.*

LETTERS PATENT**NULLITY OF**LA BANQUE D'HOCHELAGA V. MURRAY ET AL³

58. Letters patent cannot be partially annulled and par-

¹ New South Wales, 1890 June 28, L. R. XV Appeal Cases 363.

² New Zealand, 1884 June 25, L. R. IX Appeal Cases 699.

³ Quebec, 1890 June 25, L. R. XV 414.

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tially maintained; if part is null, the whole letters patent will be set aside, notwithstanding that in the conclusion of the declaration the plaintiff prayed that they might be annulled and set aside at least in so far as they were concerned.

59. Where letters patent have been obtained under false pretences, and the names of persons have been inserted in the petition without their consent, the letters patent will be annulled under article 1034 C. C. P.

SIR BARNES PEACOCK, p. 425: —Their Lordships concur with the majority of the Judges of the Court of Queen's Bench in their findings of fact, as stated in their reasons. From these it appears that the defendants were never organized as shareholders, and that no allotment of stock was ever made to them; that they had proposed the formation of a Joint Stock Company, which, however, was only to be put into operation on certain conditions, and especially that of obtaining a Government subsidy, without which it was distinctly understood that the company should not be formed; that the conditions not being fulfilled, they abandoned the project, and their names were never entered in the list of shareholders; that the bank did not lend money on their names, and was, therefore, in no respect led astray by the fact that their names were used without their permission; and furthermore, that the promoters acquiesced in the withdrawal of the defendants, and at a later period formally approved thereof, and that from the time of their severance from the project the defendants ceased to be considered or even reputed to be subscribers to the undertaking; that they were never notified of any further proceedings, nor were they ever required to pay any call; that they took no part in any further proceedings, and that their names were never entered in the stock ledger, nor in any book purporting to be kept in conformity with Section 32 of the Statute of Quebec, 31 Vict., cap. 25.

Their Lordships are of opinion that the names of the defendants were fraudulently inserted in the petition for the letters patent without their sanction or authority, and that the solemn declaration of Gerhard Lomer verifying that petition was false. There was therefore no ground for making them liable except the statements in the letters patent.

By article 1034 of the Code of Civil Procedure for the province of Quebec, it is declared that any letters patent granted by the crown may be declared null and be repealed by the Superior Court:—(1) where such letters patent were obtained by means of some fraudulent suggestion, or (2) where they have been granted by mistake or in ignorance of some material fact.

By article 1035, all demands for annulling letters patent may be made by suits in the ordinary form or by *scire facias* upon information brought by Her Majesty's Attorney General or Solicitor General, or other officer duly authorized for that purpose.

By article 1036 the information is served upon the person who holds or relies upon such letters patent, and is heard, tried, and de-

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terminated in the same manner as ordinary suits; and by article 1037 an appeal lies from the final judgment rendered upon the information.

The Court of Queen's Bench annulled the letters patent only so far as the defendants were concerned, but their Lordships are of opinion that the Code does not in such a case as the present authorize a partial annulment of letters patent. To annul the letters patent as to some only of the members of the corporate body in the present case would be to alter the constitution of the corporation created thereby. If it could be annulled as to eight or ten of the shareholders, it might be annulled as to all but five, and thus the amount of the capital of the corporation as intended by Her Majesty to be constituted might be and would be materially diminished. In fact, by such a partial annulment, a corporation might be created quite contrary to Her Majesty's intention, and such a one as would be incapable of carrying into effect the objects intended by the letters patent.

The facts found show that the grant of the letters patent and the recitals therein were obtained by means of a false and fraudulent suggestion, and are quite sufficient to warrant a total annulment of the letters patent. A material question was, however, raised by the demurrer to the information as to the construction of the prayer of the information and writ of *scire facias*. It was contended that there was no prayer to have the letters patent wholly annulled, and that the information and writ of *scire facias* merely asked for an annulment so far as the defendants were concerned. Their Lordships cannot put such a construction upon the words of the prayer. The information does not merely ask to have the letters patent declared fraudulent and void so far as the defendants are concerned, but to have them declared fraudulent and void, at least in so far as the defendants are concerned. The words "at least" make a great difference in the meaning. Their Lordships' construction of the prayer is this, that the court should declare that the letters patent were fraudulent and void, but that if the court should think fit to declare anything less, the least that should be declared should be that the letters patent were fraudulent and void in so far as the defendants were concerned.

It would be a great miscarriage of justice if the defendants should be held conclusively bound by a false recital in the name of Her Majesty in the letters patent obtained by means of a false and fraudulent suggestion, verified by a false affidavit, and should be compelled to pay the unpaid amount of shares for which they were never subscribers, and of which they were never the holders. Her Majesty has the right, under articles 1034 and 1035 of the Code of Civil Procedure of Lower Canada, to demand, by Her Attorney General, the annulment and repeal of letters patent obtained by means of any fraudulent suggestion. Her Majesty's Attorney General for the Province of Quebec, acting on behalf of Her Majesty, has by a recital in the information declared it to be his duty to protect the defendants against the unauthorized and fraudulent incorporation of them in the letters patent, and against the

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fraudulent and mistaken issue of the said letters patent, purporting to incorporate them with others as shareholders in the said Pioneer Beetroot Sugar Company; and he has, in the opinion of their Lordships, prayed on behalf of Her Majesty to have the letters patent declared fraudulent, null, and void. Their Lordships having decided that the letters patent cannot be partially annulled, are bound to advise Her Majesty to order that they be entirely annulled, and to amend the judgment of the Court of Queen's Bench, on the information for the writ of *scire facias*, in accordance with that view.

The letters patent being annulled, there is an end of the actions at the suit of the bank and of the interveners against the defendants as shareholders in the incorporated company. They are not liable to be sued as shareholders of the company in consequence of the return of *nulla bona* by the Sheriff to the writ of execution issued upon the judgment recovered by the bank against the company as incorporated by the letters patent.

Their Lordships will humbly advise Her Majesty to amend the judgment of the Court of Queen's Bench on the information for the writ of *scire facias*, by ordering the letters patent to be entirely repealed, cancelled, and annulled, instead of ordering them to be partially annulled and repealed as therein specified, and to order the said judgment to be affirmed in all other respects.

Also to affirm the judgment of the Court of Queen's Bench in the several consolidated actions, including those portions of the said judgment which relate to the interventions, and the interveners.

The appellants must pay the costs of this appeal. *See* PATENTS.

LIBEL**PRIVILEGE.**

BANK OF BRITISH NORTH AMERICA V. STRONG ¹

60. Allegations in an affidavit for *capias* are privileged, and will not support an action for libel unless falsity and express malice are proved.

DAVIS ET AL V. SHEPSTONE ²

61. The principle that the acknowledged or proved acts of a public man may lawfully be made the subject of fair comment or criticism does not extend to allegations of particular acts of misconduct said to have been committed by him. Defamatory matter thus published is not the subject of any privilege.

62. Statements made to a reporter in the employment of the proprietor of a newspaper, for the purposes of the newspaper, are not privileged.

63. In an action to recover damages for libel, it appeared that the appellants had in their newspaper falsely charged the respondent, a public officer, with specific acts of mis-

¹ New Brunswick, 1876 Feb. 10, L. R. I Appeal Cases 307.

² Natal, 1886 March 5, L. R. XI Appeal Cases 187.

PRIVILEGE.

conduct in the execution of the duties of his office, had vouched for the truth of those charges, and, on the assumption of their truth, commented on his proceedings in highly offensive and injurious language. They were held liable.

LORD HERSHELL, L. C., p. 190:—There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism, and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. In the present case, the appellants, in the passages which were complained of as libellous, charged the respondent, as now appears without foundation, with having been guilty of specific acts of misconduct, and then proceeded, on the assumption that the charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious; not only so, but they themselves vouched for the statements, by asserting that, though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their Lordships' opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege. It was insisted by the counsel for the appellants that the publications were privileged, as being a fair and accurate report of the statements made by certain messengers from King Cetewayo upon a subject of public importance. It has, indeed, been held that fair and accurate reports of proceedings in Parliament and in courts of justice are privileged, even though they contain defamatory matter affecting the character of individuals. But in the case of *Purcell v. Souler*, 2 C. P. Div. 215; L. T. Rep. N. S. 416, the Court of Appeal expressly refused to extend the privilege, even to the report of a meeting of poor-law guardians, at which accusations of misconduct were made against their medical officer. And in their Lordships' opinion it is clear that it cannot be extended to a report of statements made to the bishop of Natal, and by him transmitted to the appellants, or to statements made to a reporter in the employ of the appellants, who, for the purposes of the newspaper, sought an interview with messengers on their way to lay a complaint before the governor. The language used by the learned judge in summing up the present case to the jury is open to some criticism, and does not contain so clear and complete an exposition of the law as might be desired. But, in their Lordships' opinion, so far as it erred, it erred in being too favorable to the appellants, and it is not open to any complaint on their part. The only question that remains is as to the amount of damages. The assessment of these is peculiarly the province of the jury in an action of libel. The damages in such an action are not limited to the amount of pecuniary loss which the plaintiff is able to prove. And their Lordships see no reason for saying

PRIVILEGE.

that the damages awarded were excessive, or for interfering with the finding of the jury in this respect. They will, therefore, humbly advise her Majesty that the judgment appealed against should be affirmed and the appeal dismissed with costs.

See EVIDENCE: eodem verbo.

LICENSE

See CROWN LANDS, LEGISLATURE.

LIEN

See AFFREIGHTMENT, BOTTOMRY AND RESPONDENTIA, COLLISION, MERCHANT SHIPPING, PRINCIPAL AND AGENT, PRIVILEGE.

LIEUTENANT GOVERNOR

See GOVERNOR.

LIFE RENTS

See ANNUITY: confusion by marriage.

LIMITATION

See PRESCRIPTION.

LIQUORS

LEGISLATION ON. *See LEGISLATURE: legislative powers: temperance, license.*

LIS PENDENS

See PRACTICE: eodem verbo

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MANAGER

POWERS OF MANAGERS. See BANK AND BANKING: *iusdem verbis.*

MASTER AND SERVANT

RESPONSIBILITY OF

SERENDAT V. SAISSE¹

1. Masters and employers are responsible, under article 1384 of the Code Napoléon, for damage occasioned by the negligence of their servants or workmen (*préposés*), but it is necessary, in order that they should be liable, to

¹ Mauritius, 1868 Feb. 15, III Moore N. S. 534.

RESPONSIBILITY OF

establish that they were acting "*sous les ordres, sous la direction et la surveillance du maître ou du commettant.*"

2. "*Préposé*," in article 1384, means a person who stands in the same relation to the "*commettant*" as "*domestique*" does to "*maître*," namely, a person whom the "*commettant*" has instructed to perform certain things on his behalf.

3. A proprietor hired certain Indians, who were the heads of gangs of labourers, to clear a piece of land of weeds and brushwood at a job price, to be paid to their gangs. Through the negligence of the persons employed, the sparks of a fire kindled on the land, set fire to and burnt down a house in the immediate neighbourhood. It was proved in evidence that the proprietor interfered with the work, and directed the Indians where to work. The proprietor was by the Privy Council held responsible as *commettant* for the negligence of the labourers his "*préposés*."

SIR EDWARD VAUGHAN WILLIAMS, p. 551: — The only question, therefore, which remains is, whether the appellant was responsible for the negligence of the men so employed by him.

The respondent grounded his claim on the art. 1384 of the *Code Napoléon* (which is the prevailing law of *Mauritius*) and which is in these words: "*Les maîtres et commettants (sont responsables) du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés.*"

The respondent contended that the appellant and the men he employed stood in the relation of *commettant* and *préposé* within the meaning of this article. It is necessary, therefore, to ascertain what is the meaning of the word "*préposé*." It appears from *Napoléon Landais* dictionary that the meaning of the word "*préposé*" is "*qui est commis à quelque chose, qui en a la garde, le soin;*" and in the same book the meaning ascribed to the verb "*préposer*" is, "*commettre, établir quelqu'un avec pouvoir de faire quelque chose ou d'en prendre soin.*" And accordingly we think that, subject to the qualification hereafter to be mentioned, the word "*préposé*" in the article means substantially a person who stands in the same relation to "*commettant*" as "*domestique*" does to "*maître*" i. e., a person whom the "*commettant*" entrusted to perform certain things on his behalf. This construction of the word appears to be supported by a passage in *Dalloz' Rép. Tom. XXXIX, p. 440, No. 689*, where he says, "*Les domestiques sont une classe particulière de préposés.*"

The French lawyers, however, in their interpretation of the article, have qualified the above construction by the doctrine that in order to make the *commettant* responsible for the negligence of the *préposé*, the latter must be acting "*sous les ordres, sous la direction et la surveillance du commettant.*" This doctrine is certainly supported by the French authorities to which we were referred by the counsel for the appellant, viz:—*Dalloz Répertoire*, tit. "*Responsabilité*," ch. III, sect. 2, article 5, and the three cases of *Teston v.*

RESPONSIBILITY OF

Saller and the Mining Company of the Grand Combe; and The Northern Railway of France v. Boisseau; and Administration of Forests v. Martin; which were decided by the Cour de Cassation, and are cited in Dalloz "Jurisprudence générale," copies of which were supplied to us by counsel.

MANDAMUS

FORM OF THE WRIT.

BROWN V. LES CURÉ ET MARGUILLIERS DE L'ŒUVRE
ET FABRIQUE DE NOTRE-DAME DE MONTRÉAL¹

4. According to the Code of Civil Procedure, there is no special form for a writ of *mandamus*, and the court may make the order for the peremptory writ, after judgment has been rendered on the original petition, in the same manner as the court in England may make the rule for a *mandamus*.

5. A plaintiff may generally obtain a judgment for less than that for which he asks, and for relief in a more distinct and specific form than that for which he has prayed, provided it is within the scope of the prayer.

6. A writ of summons which in substance called upon the defendants, the *Curé et Marguilliers* of a *Fabrique*, to show cause why a writ of *mandamus* should not be issued, directing them to do a specified thing is sufficient for the issue of the writ of *mandamus*.

SIR ROBERT PHILIMORE, p. 201 : — The questions of form, which are not unimportant, may be disposed of before the graver questions which arise out of the third plea are considered.

And first, is the *mandamus* bad upon the ground of uncertainty, or upon any other ground?

Their Lordships are of opinion that the writ was in proper form according to the Code of Procedure for Lower Canada; the procedure therein pointed out, though called a *mandamus*, was not a writ of *mandamus* in the first instance, but, in effect, a summons to answer a petition praying for an order upon the defendants to do certain specified acts. The first thing to be done by the Defendants was not, as in the case of a writ of *mandamus* in England, to make a return to the writ, but to appear to the summons, and plead to the petition. The sections of the Code of Procedure bearing upon this point are 1023, 1024 and 1025. Article 1023 evidently contemplates a writ of summons. It says the application is made by petition, supported by affidavits setting forth the facts of the case presented to the Court or a Judge, who may thereupon order the writ to issue, clearly meaning a writ of summons, for it goes on, "and such writ is served in the same manner as any other writ of summons." This is rendered more clear by article 1024, which

¹ Quebec, 1874 Nov. 21, L. R. VI P. C. 157.

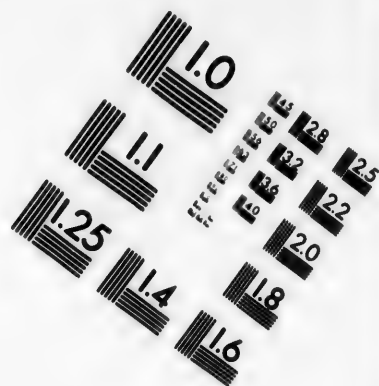
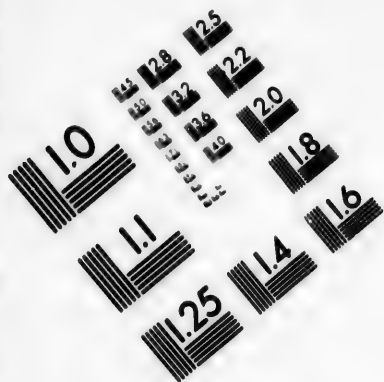
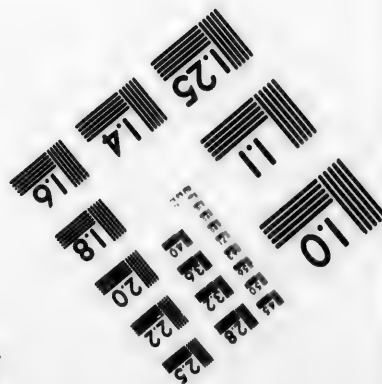
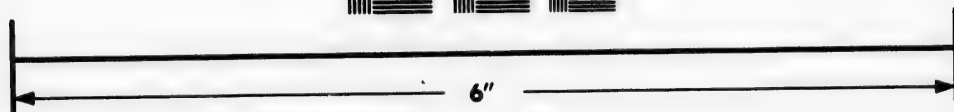
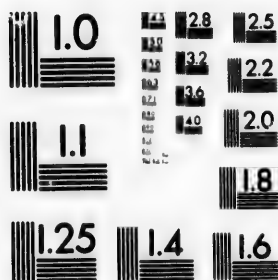


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FORM OF THE WRIT.

directs the subsequent proceedings to be had in accordance with the provisions of the first chapter of that section. That refers to articles from 997 to 1002, both inclusive; which, in cases similar to our *quo warranto*, require an information to be presented to the Court or a Judge, supported by affidavits, upon which the issue of a writ of summons may be ordered. The writ of summons commands appearance upon a day fixed, and is to be served in the manner pointed out. The defendants are to appear on the day fixed (article 1011), and to plead specially to the information (article 1012). In the case of *mandamus* under the Code, therefore, the parties are not to make a return to the summons; the pleadings are to commence with a plea to the petition, and not a plea to the return to the writ. In our opinion, therefore, the objection to the writ, so far as it related to its being a mere writ of summons, and not a writ of *mandamus* was untenable, and the practice of the court in this respect, which has always been adopted, is in compliance with the directions of the Code. The other technical objections to the writ have no substantial foundation. Three of the Judges of the Court of Queen's Bench held that the writ was correct in point of form, although one of them, Mr. Justice Badgley, being of opinion that the writ asked for too much, held that a peremptory writ could not issue commanding the defendants to do the one thing only, viz., to bury, which, according to this view, they were legally bound to do. The procedure therefore requiring a petition and plea to the petition, it appears to follow that the applicant for the writ is not so strictly bound by the prayer of his petition as he is in this country to the command contained in the first writ of *mandamus*, and that the court may mould the order for the peremptory writ in the same manner as the court here may mould the rule for a *mandamus*. There being no rule which requires a peremptory writ of *mandamus* to be granted in the precise terms of the first writ, it seems to follow that the general rule applicable to pleadings, either in equity or at common law, may be acted upon. According to them, a Plaintiff may generally obtain a decree for less than for which he asks, and for relief in more distinct and specific form than for which he has prayed, provided it is within the scope of the prayer.

In the present case the prayer of the petition was that the defendants might be commanded to bury or cause to be buried the body of the deceased Joseph Guibord, in the Roman Catholic Cemetery, conformably to usage and law. That was, doubtless, as pointed out by the Court of Review, extremely vague.

The objection to issuing a peremptory writ in that form was clearly stated by Mr. Justice Mackay (Record, pp. 270, 271).

"Under such vague conclusions," he observes, "the point really meant to be tried is hidden. That the defendants are bound to bury Guibord in the Roman Catholic Cemetery, according to the usage and the law, is indisputable, and is not disputed. Peremptory *mandamus* to do this would nevertheless leave things just as unsettled between plaintiff and defendants as they were the day before the plaintiff presented the requête."

But if the principle above laid down be acted upon, the court may,

FORM OF THE WRIT.

in a peremptory writ, specify distinctly what they consider the defendants are bound to do according to usage and law, and may peremptorily command the defendants to do it. If they consider that the defendants are bound to provide ecclesiastical burial with the rites and ceremonies of the Roman Catholic Church, they may say so. If they consider that the defendants are bound to bury the body in that part of the cemetery in which bodies of those interred with ecclesiastical burial are usually buried, the peremptory writ may be worded accordingly. If they think the defendants are bound to register the burial, the writ may go on to order such registration; or, if they think that the defendants are not bound to register the burial, they can order the burial alone.

MANDATE

See PRINCIPAL AND AGENT.

MARGUILLIERS

See FABRIQUE.

MARRIAGE

IN EXTREMIS.

SCOTT V. PAQUET¹

7. The action was to annul a marriage, and to set aside a marriage contract, on the ground that, at the time of its celebration, the husband was delirious and of unsound mind, arising from an attack of *delirium tremens*, from which disorder he died two days afterwards. But although the evidence of one of the husband's medical attendants was to the effect that, at the time of the marriage, he was unconscious, and, in his opinion, from the nature of the disease, incapable of contracting marriage, the Judicial Committee held the marriage good and, on the general review of the evidence, their Lordships found the above testimony rebutted, especially by the conduct of the same medical witness in speaking of the probability of the recovery of the deceased and by the evidence of the priest, notary, and witnesses at the marriage.

THE LORD CHIEF BARON, p. 514:—Several questions were raised (but disposed of during the argument) upon the alleged non-compliance with the formalities essential to the validity of a marriage by the law of France which prevails in Lower Canada. The objections to the marriage upon these grounds (which appeared when duly considered to be unsupported by the authorities) were abandoned by the counsel for the appellant. Two questions alone remain: The first whether this marriage was contracted while Mr. Scott was "*à l'extrémité de la vie*," within the meaning of the 6th article of the Ordonnance of 1639, the second is whether at the time when the

¹ Lower Canada, 1867 June 25, 14 Moore N. S. 503.

IN EXTREMIS.

marriage was so contracted, Mr. Scott was of sound mind and in possession of his faculties.

Both these questions have been decided in favour of the respondents, unanimously by the three judges of the Superior court and by three judges out of four of the court of Queen's Bench in Lower Canada. And we think that this court ought not, unless there be manifest error in the judgments under appeal to overrule these decisions so pronounced in the country in which the law of France, by which the first question must be determined, prevails, and must be known and continually acted upon by the courts of law; and in which also the witnesses on both sides reside and may have been more or less known or seen when under examination by the judges or some of them, who likewise are familiar with the usages and customs of the place in which all the circumstances which formed the subject of the evidence occurred.

The language of the Ordonnance¹ is this:— "*Voulons que la même peine (de la privation des successions) ait lieu contre les enfants qui sont nés de femmes que les pères ont entretenues, et qu'ils épousent lorsqu'ils sont à l'extrémité.*" (Pothier, *Mariage*, 480). Several cases appear to have been decided upon this Ordonnance, the effect of which is well expressed in Merlin's "*Répertoire*," verbo "*Mariage*," sect. 19, part 1, No 3, p. 47, vol. VIII in quarto. "*Le véritable, l'unique cas d'appliquer l'Ordonnance est lorsqu'un homme se marie dans un temps où il se sent frappé de mort, où la violence du mal et l'impuissance des remèdes lui fait sentir que la vie est prête à lui échapper.*"

It seems, from this commentary upon the law, that the patient must himself feel that he is dying, or that the violence of the disease and the inefficacy of all remedies impress him with the belief that life is about to depart.

P. 516.—Besides, this law is in restraint of natural liberty; and it must, therefore, be clear, beyond doubt, that it is applicable to the particular case before a court of justice can hold it to be of force and effect to avoid a marriage.

LEX LOCI.

SWIFT V. KELLY²

8. There are some exceptions to the rule of the *lex loci*.

If a man marries in England, and has a daughter, and goes to Turkey, and there marries a second wife, and has a son, by the law of England, the second wife would not be dowable, and the son would not take English estates to the exclusion of the daughter.

9. The rule of *lex loci* prevails only within the pale of christianity. The marriage of a monk can never be allowed to be good under the English law. See INTERNATIONAL LAW.

¹ Of Louis XIII art. 6, 26 November 1639.

² Canterbury, 1835 July 1, III Knapp 279.

LEGITIMATION OF CHILDREN.

QUANE V. QUANE ¹

10. The custom of the Isle of Man is that if a man get a maid or young woman with child, and then within a year or two after doth marry her, the child becomes his legitimate child.

11. The Judicial Committee held, with regard to this custom: 1° that it applies also to cases where the marriage was made more than two years after the birth of the child; 2° that if a woman had several children, they might be all legitimated; 3° that the custom embraced the case of a female entitled as purchaser under a will. See FILIATION: *iusdem verbis*.

PRESUMPTION OF

SASTRY VELAIDER ARONEGARY V. SEMBECUTTY VAIGALIE ²

12. The presumption is in favour of marriage, rather than in favour of concubinage, when a man and woman have lived together as man and wife, unless the contrary is clearly proved. *Piers v. Piers*, 2 H. L. C. 331; *Morris v. Dawes*, 5 Cl. & F. 163; *De Tharen v. Attorney General*, 1 App. Cas. 686; *Breadalborne Case*, Law Rep. 2 H. L. 269.

RIGHTS AND LIABILITIES OF MARRIED WOMEN.

SIMPSON V. FORCESTER ³

13. Under the Roman-Dutch law, the creditors of the husband have no right to proceed against the property of a wife, married without any contract of marriage, when she received that property from her father, that is, to enjoy the interest during her life, with the right to dispose of the whole principal at her death. The right of the wife was held not absolute, but *en fidei-commis*.

LORD WYNFORD, p. 241:—The Dutch, as well as all the other nations of Europe (except the Spaniards), have rejected that part of the Roman law which secured to the wife all her property, and protected it against the debts of the husband. The Dutch, indeed, have carried the *communitas bonorum* farther than most other modern states; for (as we find stated in a very excellent book, for a translation of which the public are very much indebted to a gentleman at this bar) by the law of Holland, all property, whether acquired by purchase, descent or gift, either before or after the marriage, and all profits made from such property, are brought by marriage into community, and are liable to the debts of husband and wife. The only property which is excepted from this law is such property as by the operation of the deed or will giving it, or by some contract

¹ Isle of Man, 1852 June 14, VIII Moore 63.

² Ceylon, 1881 Feb. 4, L. R. VI Appeal Cases 364.

³ Demerara, 1829 Dec. 3, 1 Knapp 231.

RIGHTS AND LIABILITIES OF MARRIED WOMEN.

previous to marriage, is to pass after the death of the first donee to some particular person, and such property as is affected with a trust or *fidei commissum*.

LA MOTHE V. LA MOTHE ¹

14. By the *Act of Tynwald* a wife was empowered to make a will of certain lands in favour of her lawful issue or to her husband. The wife having devised a moiety of them to her husband, it was held that he took the lands as a devisee under her will, although he was the original purchaser of the lands and was in possession of them.

CAIN V. CAIN ²

15. The law in Jersey grants, under the Ordinance of 1687, to a widow, the right to a dower *dum sola et casta vixerit*. *Lex Scripta of the Isle of Man*, Ed. 1819.

16. A widow by giving birth to an illegitimate child during the time of her widowhood lost her right to dower.

STRACHAN V. DOUGALL ³

17. A married woman cannot enter into an agreement to submit a disputed right relating to land to arbitration, and although the other parties were competent to concur in such agreement, yet the fact that one of the parties was under the disability of coverture, renders the award by the arbitrator null and void for all the parties.

THE LONDON CHARTERED BANK OF AUSTRALIA V. LEMPRIÈRE ⁴

18. When a woman has property settled to her separate use, she may bind that property without distinctly stating that she intends to do so. Bonds, notes, or obligations signed by her furnish inferences that she had an intention that her separate estate, which would be the only means of satisfying her obligations, should be bound.

19. A married woman in respect of her separate estate is to be considered as a *feme sole*, and may bind her separate estate even by general engagements when they are made upon the faith or credit of that estate. *Johnson v. Gallaher*, 3 D. F. & J. 513; *Murray v. Barlee*, 3 M. & K. 207; *Owens v. Dickson*, Cr. & P. 48; *Bourke v. Tuile*, 19 In L. Ref. (Ep.) 467; *Vaughan v. Vanderstegen*, 2 Drew 165, 289, 263, 408; *Wright v. Chard*, 4 Drew 673; *Aylett v. Ashton*, 1 My. & Cr 105; *Nail v. Pantes*, 5 Sim. 555; *Morton v. Turaill* 2 P. Wm

¹ Isle of Man, 8 May 1830, 1 Knapp 271.

² Isle of Man, 1838 Feb. 15, 11 Moore 222.

³ Jamaica, 1850 Feb. 18, VII Moore 365.

⁴ Victoria, 1873 Feb. 6 L. R. IV P. O. 672.

RIGHTS AND LIABILITIES OF MARRIED WOMEN.

144; *Sockett v. Wray*, 4 Bro. P. P. 488; *Hughes v. Wells* 9 Hare 749; *Heatley v. Thomas*, 15 Ves. 596; *Tullett v. Armstrong*, 4 Beav. 319.

HAMEL V. PANET¹

20. A married woman can legally renounce, in favour of a creditor of her husband, her hypothecary rights on the property of her husband and in the community; and this notwithstanding the provision of the Registry Ordinance that "no married woman shall become security, or incur any liability, other than as *commune en biens* with her husband, for debts or obligations entered into by her husband before their marriage, or which may be entered into by her husband during their marriage."

21. Engagements which a married woman assumes together with her husband and for the latter's benefit, though with third parties and not creditors of the husband, are to be treated constructively as his liabilities, and such a contract, whether it be of suretyship for somebody else or of any other kind, is to be treated primarily as his contract, and the wife as brought in by the husband to secure the liability which he is going to contract. *Jodoin v. Dufresne*, 3 L. C. R. 189.

22. The stipulation of general mobilization in a contract of marriage is valid, and under it everything inherited by the wife from the father and mother, and all property by them given to be *conquêts de communauté*, is entirely subject to the disposal of the husband, who may legally sell or hypothecate it; and, upon the dissolution of the community, the wife is not entitled to claim such property, except subject to the mortgages which the husband may have created thereon as head of the community.

23. A *propre ameubli* of the wife may, during the community, be effectually hypothecated by the husband; and the wife, even if she have the *clause de reprises* in her favour, and although she may renounce the community, cannot defeat such mortgage. *David v. Gagnon* 14 L. C. R. 110.

LORD SELBORNE, p. 151:—Their Lordships are thus brought to the only remaining point: was or was not this instrument, which must now be taken as well executed, authentic and probative,—sufficient in law to bind the title which the respondent claims through the donation of the mother? Their Lordships think that, having regard to the terms of the law and the decisions upon it, they ought to hold that it was sufficient for that purpose. The matter stands thus. In 1808 Joseph Falardeau, the father, married his wife, and

¹ Québec, 1876 Nov. 18, L. R. II Appeal Cases 121.

RIGHTS AND LIABILITIES OF MARRIED WOMEN.

two instruments were then contemporaneously executed. By one of them, the immoveable property in question, with other things, was conveyed by way of donation by the wife's mother to the future husband and wife, that is, to Falardeau, and Josephte Savard. By the other, which was a marriage contract, Falardeau and his wife agreed *inter se* that they would live in community; that all immoveable as well as other property belonging to either of them at the date of the marriage should be brought into community; that it should, for the purposes of the community, be deemed moveable; and then there was a clause, called the clause of *reprise*, at the end, to the effect that when the community was dissolved by death or otherwise, the wife might, at her option, reclaim or resume all property brought in on her part clear and free from the debts and charges of the community; but with this qualification, that in any case in which she had bound herself, or *parlé*, (which their Lordships understand to mean assented in any manner verbally or personally to a particular debt or charge), or had a judgment pronounced by some competent court against her; in those cases she was to rely upon and to have the benefit of the liability of her husband's estate, to supply what evidently that clause supposed she would lose; and should have, as from the date of the marriage, a hypothec upon her husband's estate for the fulfilment of that contingent obligation. The community still subsisted as to this immoveable property when the deed now in question was passed in 1855. Three years afterwards, the wife elected to dissolve the community, and to take the benefit of this clause of *reprise*. The question is whether, having previously assented to this notarial act passed in favour of the appellants, she is or is not bound by the hypothec contained in that act. By the law of Lower Canada (it is not necessary to refer to the text), it is provided that a married woman shall not become surety for the debts of her husband; and it has been decided upon that law, in the case of *Jodoin v. Dufresne*, that all engagements, though with third parties and not creditors immediately of the husband, which the wife enters into concurrently with the husband, are to be treated constructively as his liabilities; that is to say, that the contract, whether it be of suretyship for somebody else or of any other kind, is to be treated as primarily his contract, and the wife as brought in by him to secure the liability which he is going to contract. Their Lordships wish it to be distinctly understood that they express no opinion upon the question, whether that case of *Jodoin v. Dufresne* was well decided or not. It is not in their opinion now necessary to say a word which will detract from its authority, whatever that may be; but they also desire to say nothing which can be deemed to add to its authority. But, taking this to be good law, still the question remains, what the effect of that doctrine is upon this particular transaction? Now this transaction consists, as far as the appellants and the debtor are concerned, really of three parts. In the first part it is expressed that they pledge themselves as sureties for the payment of the son's debt. The law, as interpreted in that case, clearly and beyond controversy renders that null and ineffectual as far as the mother is concerned, but leaves it

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perfectly effectual and valid as far as the father is concerned. Next they purport, as such sureties, to hypothecate the immoveable property in question which was then in the community as moveable. The law again, their Lordships assume, would strike at that which they purport to do as sureties by way of hypothecation, so far as the wife is concerned, and would leave that part of the deed as only the husband's deed; but it would be, as far as his power over this property in community extended a perfectly good deed, and valid and effectual, subject to what might follow from the clause of *reprise* in the marriage contract. There is a third part of the deed, which is not connected in like manner with the first or with the obligation of suretyship so far as the wife is concerned. On the contrary, it is expressed in words which show that the framers of it were well aware that it was necessary to deal there with a distinct matter, which might or might not be effectual, apart from the preceding context. In that portion of the deed the wife expresses her consent to the hypothecation of the immoveable property in question by her husband in favour of the creditors, and renounces in their favor all claims, whether by way of property or of hypothec, which she might otherwise have been competent to make to their prejudice. Does that consent and that renunciation fail, because she could not make herself a surety, and because she could not hypothecate in the character of surety? Their Lordships see no reason for holding that it does fail. In that opinion they are fortified, as appears to them, both by reason and by authority. By reason, because the wife could only claim to disturb the husband's hypothecation by virtue of the clause of *reprise* on which she acted two or three years afterwards, in the marriage contract. But that clause of *reprise*, if you look to its terms, does not enable her to resume or reclaim anything as against a creditor in whose favour she has consented to the act of her husband during the community; and their Lordships think there is no reason or authority for holding that the law, which was passed long after that contract, to prevent married women making themselves sureties for their husbands, could enlarge the effect of the clause of *reprise* or make it operative in the wife's favor as against the husband's power over the community, in a case in which, according to the qualification expressed in its terms, it would not be so operative. It has been expressly so decided in Lower Canada in the case, in the 14th of the Lower Canada Reports, of *David v. Gagnon*; and although that appears to be the decision of a single judge, their Lordships see no reason to doubt that it was well decided, and they have no reason to suppose that it has ever since been called in question. The other authorities also go to the effect, that, although there may be in a deed an ineffectual attempt to bind a married woman by words of obligation, yet a renunciation of this kind in the same deed is perfectly good. Two decisions of the courts of Lower Canada,—no doubt by a majority of judges in each case, and I think one judge changed his mind,—Chief Justice Duval,—are referred to in the Record; both of which determined that the renunciation and the consent of the wife to her husband's act, as against such rights as she might have under a marriage contract, whether

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of hypothec or of *reprise*, may be good, although she could not bind herself by a direct contract, which she had attempted to do in the same deed. Their Lordships see no reason to differ from those decisions. It therefore is unnecessary to go into the further consideration of the question, whether a clause of *reprise* may or may not be so conceived as to destroy the husband's power over mobilized immoveables of the wife *durante communitate*. Pothier evidently thought the better opinion was that no clause of *reprise* would do so, for that the effect of mobilization and the effect of community taken together required, that while the community subsisted the husband should be able to deal with the immoveables as moveables; but at the same time, recognizing some difference of opinion among jurists on the subject, he suggested that clauses should be worded so as to remove that doubt; and this clause in fact has been so worded. The other authority, Renusson, relied upon by the respondent, most distinctly recognizes the general power of the husband, during the community, not only to sell, but to hypothecate the wife's immoveables under such circumstances; and all that can be said to the contrary, as far as he is concerned, is that he saves and does not determine the question, what the effect of a clause of *reprise* might be, supposing it were expressed in terms which clearly were intended to give the wife a right paramount to any hypothecation or alienation by her husband. The authorities, as far as they go, upon this subject, appear to their Lordships to be entirely one way, and that is against the respondent.

On the whole case, they are of opinion that the present appeal must be allowed, and with the usual consequences as to costs.

Their Lordships will therefore humbly recommend Her Majesty to reverse the judgment of the court of Queen's Bench for the Province of Quebec, with costs, and to affirm, with costs, the judgment of the Superior court.

SURETYSHIP BY MARRIED WOMEN. See SURETYSHIP: *iusdem verbis*.

VALIDITY OF

SWIFT V. KELLY ¹

24. Marriage can only be set aside on clear proof of fraud, error or for informalities where some positive provision of law has been violated; deception however great it may be is not sufficient to annul a marriage.

LORD BROUGHAM, p. 293:—It would seem, indeed, to be the general law of all countries, as it certainly is of England, that unless there be some positive provision of statute law, requiring certain things to be done in a specified manner, no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances, consent never would have been obtained. Unless the party imposed upon has been deceived as to the person, and thus has given no consent

¹ Canterbury, 1835 July 1, III Knapp. 293.

VALIDITY OF

at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made. If such be the law touching consent to the marriage itself, and the fraud whereby that consent was obtained, it would be extraordinary indeed if another rule were allowed to govern the case where fraud has been practised upon a third party, acting immaterially in granting the license to celebrate it.

TONGUE V. TONGUE¹

25. The omission of one of the christian names of the man, a minor, in the publication of bans, and the celebration of the marriage under this imperfect name, render the marriage null and void, under 4 Geo. 4, ch. 76, s. 7, and 22, as being a clandestine marriage.

BELL V. GRAHAM²

26. The fact that a certificate of marriage was antedated four years, does not invalidate a marriage, performed in Scotland, before the statute 19th and 20th Vict. ch. 96, and before witnesses *per verba de presentis*. Both parties were domiciled in England.

27. The motives of one of the parties who has in view only a simulated object cannot defeat the marriage where there has been a mutual declaration of present marriage.

VALIDITY OF MARRIAGE BETWEEN TWO PROTESTANTS ABJURING THEIR FAITH AND BECOMING CATHOLICS.

SWIFT V. KELLY³

28 According to the laws of the Roman Catholic Church, abjuration of the protestant faith by protestants and their reception into the bosom of the Roman Catholic Church, is a condition precedent to the vesting of the power of nuptial celebration in the priest.

29. It is not necessary that there should be a real, sincere and hearty abjuration of the protestant and taking of the catholic faith, exterior acts are sufficient, provided the abjuration is not brought about by compulsion, and is made in the form prescribed by the church.

LORD BROUGHAM, p. 287:—The Roman authorities can only be supposed to require that a certain outward act should be done; they never can undertake to judge of the inward heart; that belongs not to them, or to their powers, or their tribunals; what the consequence would be of a party stating at the time of performing the ceremony of abjuration, that he did not mean what he said, and was not sincere in what he did; or of two parties previously making

¹ Canterbury, 1836 June 21, I Moore 90.

² York, 1859 Dec. 8, XIII Moore 243.

³ Canterbury, 1835 July 1, III Knapp. 257.

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evidence, which afterwards came out and showed the whole to be an imposition and a farce, or even of their declaring immediately after that all they had done amounted to no more; there is no occasion here to inquire, for nothing of the kind exists in the case, though it would be a most perilous thing and inconsistent with the whole marriage law, and its principle, to enable parties by previous contrivance to hold in their hands a power of dissolving their marriage, or by subsequent declaration to free themselves from the fetters of their matrimonial contract.

CONNELLY V. CONNELLY ¹

80. Both parties were protestant born, domiciled and married in Philadelphia, United States. In 1835, the wife became a convert to the Roman Catholic faith. In 1843, they went to Rome and upon the rescript and allowance of the Pope on their own demand, they were separated; the husband, who had previously also become a convert, entered holy orders and was ordained priest; the wife entered as a nun in a community. In 1846, they were together in England, the husband was chaplain and the wife superioress of a religious house. In 1848, the husband renounced the catholic faith and again became a protestant. He then required his wife to come back with him, and on her refusal, he took an action for restitution of conjugal rights. The wife pleaded an allegation of twenty-one articles containing the acts of the parties and rescript of the Pope. The pretention of the wife was that the rescript of the Pope had the force and effect of a judicial decree of separation *a mensâ et thoro*. The Judicial Committee admitted the allegation, and ordered that it should be reformed by pleading the law of Pennsylvania and also the place of the parties and their domicile at the time of their marriage.

MERCHANT SHIPPING**CONSTRUCTION OF MERCHANT SHIPPING ACT.**

THE GENERAL STEAM NAVIGATION COMPANY V. TONKIN.

THE "FRIENDS" ²

31. One of the rules of the Trinity House is as follows: "When steam-vessels on different courses must unavoidably or unnecessarily cross so near, that, by continuing their respective courses, there would be a risk of coming in collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other. A steam-vessel passing

¹ Canterbury, 1851 June 28, VII Moore 438.

² Admiralty, 1844 Feb. 6, IV Moore 314.

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another in a narrow channel must always leave the vessel she is passing on the larboard hand."

32. This rule is not applicable when either vessel is so near the shore, that by porting her helm there would be greater danger of collision. In such case the vessel in a right course may port her helm to starboard.

BLIGH V. SIMPSON. THE "FUSILIER" ¹

33. The words "persons belonging to such ship" in the 458th section of the Merchant Shipping Act, 1854, include passengers on board the ship, as well as the master and crew; who, in respect to remuneration for life salvage, stand on the same footing as the master and crew.

THE "VELOCITY" ²

34. In considering the movements of vessels approaching each other from a contrary direction, the rules 13, 14 and 18 regulating the duty of two vessels when they first come in sight of each other, must not alone be regarded and too strictly adhered to; regard must be had to circumstances, such as the bend of the river, or the necessity of avoiding another vessel, which may occasion the apparent alteration of the course.

THE "JESMOND" AND THE "EARL OF ELGIN" ³

35. Article 16 of the admiralty regulations for preventing collisions at sea only applies when there is a continuous approaching of two steamships.

When two ships under steam "are meeting end on, or nearly end on, so as to involve risk of collision," as provided for in article 13, and one of them at a proper distance ports her helm sufficiently to put her on a course which will carry her clear of the other, and enable her to pass on the port side, she thereby determines the risk, and is not approaching another ship so as "to involve risk of collision" within the meaning of article 16, and is not bound to slacken speed or stop.

MORTON V. HUTCHINSON. THE "FRANKLAND" ⁴

36. Article 16 of the rules and regulations for preventing collisions at sea provides, that "every steamship, when approaching another ship so as to involve risk of collision,

¹ Admiralty, 9 Feb. 1865, III Moore N. S. 51.

² Admiralty, 27 Nov. 1869, VI Moore N. S.

³ Admiralty, 13 Nov. 1871, VIII Moore N. S. 179.

⁴ Admiralty, 6 Dec. 1872, IX Moore N. S. 365.

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shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall, in a fog, go at a moderate speed."

A steamship navigating in a fog, at a moderate speed, hearing a whistle sounded many times, indicating that a steamer was approaching her, and had come very near to her, so near that if the vessels had then been stopped they would have been within hailing distance, is bound under the 16th article not only to stop the motion of her engines, but to reverse them, so as to stop the motion of the vessel, and ought not to wait until the vessels sight each other, when such a manœuvre may be too late.

SCICLUNA V. STEVENSON. THE "RHONDDA" ¹

37. The strait of Messina is a narrow channel within the meaning of the admiralty regulations and the Merchant Shipping Act, sect. 21.

See COLLISION: parties in fault.

DUTIES AND LIABILITIES OF OWNERS, MASTERS OR PILOTS.

STUART V. ISEMONGER ²

38. When a vessel is under the charge of a licensed pilot, the owners, by 6th Geo. IV, ch. 125, s. 55, are exempted from liability in respect of damage done by this vessel, unless it is done by the carelessness of the master or crew.

39. It must be manifest, upon every view which can be taken of the principles applicable to this question, that the civil responsibility of the owners for the damage done in navigating their vessel, like that of all persons employing servants for their own benefit, can be restricted only in so far as their own acts, or, which is the same thing, the acts of their servants, are not the cause of the damage done.

HAMMOND V. ROGERS. THE "CHRISTIANA" ³

40. The English statute 6th Geo. IV, ch. 125 relieves owners of vessels from liability for damages done by their ship, when the damage is occasioned by the fault, negligence or misconduct of the pilot alone.

41. The *onus probandi* lies on the owner of a ship, claiming exemption from liability for damages under the above Act, by reason of having a licensed pilot on board, to prove that the damage was occasioned by the fault of the pilot.

42. When the pilot has fulfilled his duty, if he does not

¹ V. A. Malta, 5 June 1883, L. R. VIII Appeal Cases 549.

² Admiralty, 11 Feb. 1842, IV Moore 11.

³ Admiralty, 1850 Feb. 19, VII Moore 160.

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quit the ship, she nevertheless continues to be under his charge and responsibility.

Mr. BARON PARKE, p. 171: — The duties of the master and the pilot are in many respects clearly defined. Although the pilot has charge of the ship, the owners are most clearly responsible to third persons for the sufficiencies of the ship and her equipments, the competency of the master and crew, and their obedience to the orders of the pilot in everything that concerns his duty; and, under ordinary circumstances, we think that his commands are to be implicitly obeyed. To him belongs the whole conduct of the navigation of the ship, to the safety of which it is important that the chief direction should be vested in one only.

The expressions attributed to the learned judge, in the report of his judgment in this case, we are perfectly satisfied, were never intended to suggest that under ordinary circumstances, the master was to exercise any discretion whether he would obey the pilot or not. There may be extraordinary occasions when the master would be justified in disobeying the commands of the pilot. If, from sudden illness or intoxication, he becomes incompetent to command, the supreme authority would revert to the master during the period of the pilot's temporary incapacity. It may be the same in the case of manifest incapacity of a permanent character; but any opinion upon these questions is unnecessary for the decision of the present case, as none of these circumstances occurred. The pilot has, unquestionably, the sole direction of the vessel in those respects where his local knowledge is presumably required; the direction, the course, the manœuvres of the vessel, when sailing, belong to him.

POLLOK V. McALPIN. THE "LOCHLIBO" ¹

43. When a collision is occasioned by the improper sailing and steering of a vessel, the exclusive act of the pilot, the owners of the vessel are protected by the Pilot Act 6 Geo. IV from liability for damage.

BATES V. DON PABLO SARA. THE "MOBILE" ²

44. The statutes 6th Geo. IV, ch. 125, sec. 55 and 17th & 18th Vict., ch. 104, sec. 388, only exempt the owner of a vessel, having a licensed pilot on board, from liability for damage, when the damage is caused exclusively by the negligence or unskilfulness of the pilot.

45. When, therefore, a collision was caused by the joint negligence of the pilot and the crew, the statute does not exempt the owners from damages for a collision caused by their vessel.

¹ Admiralty, 1851 June 24, VII Moore 427.

² Admiralty, 1856 July 2, I Moore 467.

DUTIES AND LIABILITIES OF OWNERS, MASTERS OR PILOTS.

THE NORTH GERMAN LLOYD STEAMSHIP CO.
V. ELDER. THE "SCHWALBE" ¹

46. The 388th section of the Merchant Shipping Act, 17th and 18th Vict., ch. 104, protects the owners from loss or damage when occasioned by the sole fault or incapacity of the pilot.

The *onus probandi* lies upon the owners to prove that fact, and they must prove not merely that the crew were under the pilot's orders at the time, but that the order which caused the damage was actually given by the pilot. *Track v. Dowie. The "Carrier Dove," Admiralty, 1863 July 3, II Moore N. S. 260.*

PROWSE V. THE EUROPEAN AND AMERICAN STEAM
SHIPPING CO. THE "PEERLESS" ²

47. When a vessel is not bound to take a licensed pilot on board, but takes one, the owners are liable for his negligence, as they are for that of their ordinary servants.

MALCOMSON V. BALDOCK. THE "EARL OF AUCKLAND" ³

48. The Merchant Shipping Act, sec. 353, exempts masters of vessels from employing a licensed pilot for certain voyages. Where, therefore, a pilot is employed by the master for such voyages, the owners of the vessel are responsible for his conduct as well as for the rest of the crew,

THE "IONA" ⁴

49. In order to entitle the owner of a ship, having, by compulsion of law, a pilot on board, to the benefit of the exemption contained in the Merchant Shipping Act, 17th and 18th Vict., ch. 104, sec. 388, from liability for damage by default of the pilot, it is not enough to prove that there was fault or negligence on the pilot's part, but the owner must show that there was no default on the part of the master and crew, which might have in any degree been conducive to the damage. When, therefore, there was neglect on the part of the master and crew to keep a good look out, and such neglect conduced to a collision, the owners were held liable for the damage. The duty of the pilot is to attend to the navigation of the ship, and the master and crew to keep a good look out. *The "Velasquez" 1867, July 4, IV Moore N. S. 426.*

¹ Admiralty, 1860 Dec. 14, XIV Moore 241.

² Admiralty, 1860 July 8, III Law Times N. S. 126.

³ Admiralty, 1862 Dec. 10, XV Moore 304.

⁴ Admiralty, 1867 Feb. 18, IV Moore N. S. 336.

DUTIES AND LIABILITIES OF OWNERS, MASTERS OR PILOTS.

MOSS V. THE AFRICAN STEAMSHIP CO. THE "CALABAR"¹

50. In a case of collision occasioned by a vessel under compulsory pilotage, where no contributory negligence on the part of the master and crew is proved, the pilot in charge is solely responsible, and the owners are exempt from the consequences of his neglect or default. It is the province of the pilot in giving directions for the navigation of a steam vessel of which he is in charge, to determine the rate of speed at which she should proceed. *The "Ocean Wave."* VI Moore N. S. 492.

THE OWNERS OF THE STEAMSHIP "LION" V. THE OWNERS OF THE SHIP "YORKTOWN." THE "LION"²

51. The payment of a fare is necessary to constitute a *passenger* within the meaning of the compulsory pilotage sections of the Merchant Shipping Act (17th and 18th Vict., c. 104).

52. Persons on board by invitation from the captain, who had neither paid, nor agreed to pay, any fare, before a collision took place, were not "*passengers*" so as to exonerate the owners from the damage occasioned by the pilot's default.

53. Held also, that it is not compulsory on a passenger ship to take a licensed pilot on board when she is not carrying passengers; and the owners are responsible for the negligence of the pilot, where they were not compellable to put him in charge of their vessel.

REDPATH V. ALLAN ET AL. THE "HIBERNIAN"³

54. Under the Canadian Statute 27-28 Vict., ch. 13, s. 59, where a collision was occasioned by the improper sailing and steering of a vessel, the exclusive act of the pilot, the owners of the vessel are protected from liability for damage.

55. This statute is binding as well on the High Court of admiralty as on the Vice-admiralty court in Canada.

56. It does not matter whether the pilot was chosen, by the master himself, from amongst a certain class of pilots, as this selection did not create between them the relation of master and servant and did not take the case out of the statute.

57. Their Lordships having found decisions in American cases contrary to the principles applied in this case, declared that they were bound to follow the precedents of the English courts.

¹ Admiralty, 1868 Nov. 30, V Moore N. S. 291.

² Admiralty, 1869 June 16, VI Moore N. S. 163.

³ V. A. Quebec, 1872 Dec. 3, L. R. IV P. C. 511.

DUTIES AND LIABILITIES OF OWNERS, MASTERS OR PILOTS.

DUNCAN V. KOSTER. THE "TEUTONIA" ¹

58. The master has the entire direction of the ship, and he may deviate from his course when he has good reason to do it, such as a reasonable fear of pirates.

LORD MELLISH, p. 422:—It seems obvious that, if a master receives credible informations that, if he continues in the direct course of his voyage, his ship will be exposed to some imminent peril, as, for instance, that there are pirates in his course, or icebergs, or other dangers of navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding the danger. And their Lordships agree, if authority was wanting, that the case of *Pole v. Cetcovith* ² is an authority in point.

GAUDET V. BROWN. THE "ARGUS" and THE "HEWSONS" ³

59. In a case where no application for delivery is made, the captain may land and warehouse the cargo at the expense of the merchant; and where that is forbidden by the authorities of the port, he is not justified in destroying the cargo; but in the absence of advices he may take it to such a place as in his judgment is most convenient for the merchant, and may charge to the merchant all expenses properly incurred.

SIR MONTAGUE E. SMITH, p. 160:—The following observations on this subject occur in the judgment of *Tindal, J.*, in the case of *Gatliffe v. Bourne* ⁴. But we know of no general rule of law which governs the delivery of goods under a bill of lading, where such delivery is not expressly in accordance with the terms of the bill of lading, except that it must be a delivery according to the practice and custom usually observed in the port or place of delivery

P. 164:—The next question to be considered is, whether the plaintiff is entitled to compensation in the shape of homeward freight for bringing the petroleum back to England.... as pointed out by the judge of the Admiralty court, the same kind of question arose in *Christy v. Rom*. ⁵ In that case *Sir James Mansfield* says:—"Where a ship is chartered upon one voyage outwards only, with no reference to her return, and no contemplation of a disappointment happening, no decision, which I have been able to find, determines what shall be done in case the voyage is defeated; the books throw no light on the subject. The natural justice of the matter seems obvious; that a master should do that which a wise and prudent man would think most conducive to the benefit of all concerned.

¹ Admiralty, 1872 Feb. 8, VIII Moore N. S. 411.

² C. B. (N. S.) 430.

³ Admiralty, 1873 May 30, V L. R. V P. C. 34.

⁴ 4 Brig (N. C.) 329.

⁵ 1 Taunt, 300.

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But it appears to be wholly voluntary; I do not know that he is bound to do it; and yet, if it were a cargo of cloth or other valuable merchandize, it would be a great hardship that he might be at liberty to cast it overboard. It is singular that such a question should at this day remain undecided."

The precise point does not seem to have been subsequently decided; but several cases have since arisen in which the nature and scope of the duty of the master, as agent of the merchant, have been examined and defined (amongst others, *Tronson v. Dent*¹; *Notara v. Henderson*²; *Australasian Navigation Company v. Morse*³). It results from them that not merely is a power given, but a duty is cast on the master in many cases of accident and emergency to act for the safety of the cargo, in such manner as may seem best under the circumstances in which it may be placed; and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing.

Most of the decisions have related to cases where the accident happened before the completion of the voyage; but their Lordships think it ought not to be laid down that all obligations on the part of the master to act for the merchant cease after a reasonable time for the latter to take delivery of the cargo has expired. It is well established that, if the ship has waited a reasonable time to deliver goods from her side, the master may land and warehouse them at the charge of the merchant; and it cannot be doubted that it would be his duty to do so rather than to throw them overboard. In a case like the present, where the goods could neither be landed nor remain where they were, it seems to be legitimate extension of the implied agency of the master to hold that, in the absence of all advices, he had authority to carry or send them on to such other place as in his judgment, prudently exercised, appeared to be most convenient for their owner; and if so, it will follow from established principle that the expenses properly incurred may be charged to him.....

If the goods had been of a nature which ought to have led the master to know that on their arrival they would not have been worth the expenses incurred in bringing them back, a different question would arise.....

The authority of the master being founded on necessity would not have arisen, if he could have obtained instructions from the defendant or his assignees.

DOMARD V. LINDSAY. THE "WILLIAM LINDSAY." *

60. Where the master of a ship takes all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger, his owners are not held responsible because he may have omitted some possible

¹ 8 Moore, P. C. 419.

² L. R. 7 Q. B. 223.

³ L. R. 4 P. C. 222.

⁴ Admiralty, 1873 May 26, L. R. V P. C. 338; XXIX L. T. N. S. 355.

DUTIES AND LIABILITIES OF OWNERS, MASTERS OR PILOTS.

precaution which the event suggests that he might have resorted to.

WOOD V. SMITH. THE "CITY OF CAMBRIDGE" ¹

61. In leaving the dock, the master wishing to prosecute his voyage by getting to sea as soon as possible, made certain arrangements with the pilot to cross the bar on the next morning's tide. The Judicial Committee held that this was proceeding to sea within the law, although the vessel had anchored at a short distance, as agreed with the pilot, in order to be ready to get out to sea at the next tide. It was held also that under these circumstances, the employment of a pilot was compulsory, and the owners of the vessel were not liable for the collision that took place.

62. The pilots who have right to extra remuneration are only those voluntarily engaged, or those detained along the voyage in the river.

LIEN ON SHIPS.

THE "NEPTUNE" ²

63. The creditor who has supplied a ship in England has no privilege on the proceeds of the sale of the ship judicially sold at the demand of the seamen for their wages. The balance of the proceeds after the payment of the seamen's wages goes to the mortgagee of the ship.

DEAN HASSELT V. SACK ³

64. The agents of a foreign ship supplied her from time to time with coals, and made other disbursements, receiving the freight, and crediting the same to their accounts. On a general settlement of accounts, they arrested the ship for the balance appearing to be due.

The Judicial Committee declared the arrest illegal and invalid as they could not select from the accounts the items for coals, and attribute the balance specifically to those items, and, therefore, the specific demand was not proved.

JOHNSON V. BLACK. THE "TWO ELLENS" ⁴

65. There is no lien on a ship for a debt contracted for repairs done and necessaries supplied, until the suit is instituted, and all valid charges on the ship, such as mortgages, must take precedence.

¹ Admiralty, 1874 March 20, L. R. V P. C. 451.

² Admiralty, 1835 July 14, 11 Knapp 94.

³ Admiralty, 1860 Feb. 16, Law Times II vol. N. S. 613.

⁴ Admiralty, 1872 Feb. 1, VIII Moore 398.

LIEN ON SHIPS.GIOVANNI DAPUETO V. JAS. WYLLIE & CO. THE "PIEVE SUPERIORE" ¹

66. There is no maritime lien upon a ship for damage done to the goods, or any part thereof, by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship.

LAWS V. SMITH ²

67. There is no lien on a ship for necessary supplies, such as coal. *The Neptune*, 3 Knapp 94; *The Alexander*, 1 Wm. Rob. 288; 1 notes of cases, 188; *The Bold Buccleugh*, 7 Moore P. C. 267; *The Volant*, 1 Wm. Rob. 387; *The West Friesland*, Sma. 454; *The Ella A. Clark*, Br. & L. 92; 32 L. J. P. M. Vol. IX. *The Two Ellens*, L. R. 3 A. & E. 345; 4 P. C. 161; *The Pacific*, Br. & L. 243; *The Mary Ann*, L. R. 1 A. & E. 8.

GENERAL AVERAGE.STRANG ET AL V. SCOTT ET AL ³

68. Each owner of jettisoned goods becomes a creditor of the ship and cargo saved, and has a direct claim against each of the owners of ship and cargo, for a *pro rata* contribution towards his indemnity, which he can enforce by a direct action. *Dobson v. Wilson*, 3 Camp. 484.

69. It is also settled law that, in the case of a general average, the owner of goods sacrificed for the common benefit has a lien upon each parcel of goods salvaged belonging to a separate consignee, for a due proportion of his individual claim. *Crooks v. Allan*, 5 Q. B. D. 38; *Burton v. English*, 12 Q. B. D. 220.

70. The only exception is in behalf of deck cargo, or when a person, by his own fault, has occasioned the peril. *Schloss v. Heriot*, 14 C. B. (N. S.) 59.

REGISTRATION OF SHIPS.CRAWFORD V. SPOONER ⁴

71. A ship was built in 1816 and navigated under the flag of Portugal until 1824. She then passed under the British flag and remained thereunder up to 1826. Then she returned to Portugal and from thence she went to a Danish merchant, and, finally, in 1841 was sold to an English resident at Bombay. The name of the vessel was changed a number of times. It was held that she could be registered at Bombay as an English ship.

¹ Admiralty, 1874 March 21, L. R. V P. C. 482.

² V. A. Gibraltar, 1884 Feb. 9, L. R. IX Appeal Cases 356.

³ Rangoon, 1889 Aug. 1, L. R. XIV Appeal Cases 601.

⁴ Bombay, 1846 Dec. 15. VI Moore 1.

SALE OF SHIP BY MASTER.

LAPRAIK V. BURROWS. THE "AUSTRALIA" ¹

72. When a ship is in a bad condition and cannot be made seaworthy without very extensive repairs, and the master has no means of defraying the expense of such repairs, and is not able to raise the requisite money upon bottomry of the ship, and specially if the ship is heavily mortgaged and is threatened with proceedings in the Admiralty court, the master is justified in selling the ship.

THE RIGHT HON. DR. LUSHINGTON, p. 144:—The law, as we conceive it to be settled, is this, that there must be a necessity for the sale; that when the master has no authority from his owner to sell, the master is not at liberty to sell merely because he deems it to be advantageous to his owner, but that there must be necessity for the sale. The necessity which the law contemplates is not an absolute impossibility of getting the vessel repaired; but if the ship cannot be sent upon her voyage without repairs, and if the repairs cannot be done except at so great and so certain a loss that no prudent man would venture to encounter it, this constitutes a case of necessity. We should be exceedingly reluctant to relax the law upon this head, because it is of great importance that masters of ships should not divest their owners of their interest in those ships without due authority, except they are strictly justified by the necessity of the case.

Much has been said with regard to the *onus probandi*, and their Lordships are disposed to agree that the *onus probandi* undoubtedly lies upon the original purchaser from the master. But how far that *onus probandi* extends in the case of a second purchaser, and what effect lapse of time has upon that question, is a difficult matter, which must depend on all the circumstances of the case.

THE AUSTRALASIAN STEAM NAVIGATION COMPANY V. MOORE ²

73. The general principles of law are that the authority of the master to sell the ship belonging to an absent owner is derived from the necessity of the situation in which he is placed. Therefore, to justify his dealing with the goods, he must establish: First, the necessity for the sale; secondly, his inability to communicate with the owner, and obtain his directions.

SIR MONTAGUE E. SMITH, p. 490:—Under these conditions and by force of them, the master becomes the agent of the owner, not only with the power, but under the obligation (with certain limits) of acting for him; but he is not, in any case, entitled to substitute his own judgment for the will of the owner, in the strong act of selling the goods, where it is possible, as hereafter explained, to communicate with the owner, and ascertain his will.

¹ V. A. Hong Kong, 1859 July 19, XIII Moore 132.

² New South Wales, 1872 March 22, VIII Moore N. S. 482.

SALE OF SHIP BY MASTER.

P. 493:—A sale of cargo by the master may obviously be necessary in the above sense of the word, although another course might have been taken in dealing with it; for instance, if in this case the wool, which had no value but as an article of commerce, could have been dried and repacked, and then stored or sent on, but at a cost to the owner clearly exceeding any possible value of it to him when so treated, it would plainly have been the duty of the master to sell, as a better course for the interest of the owner of the property, than to save it by incurring on his behalf a wasteful expenditure. In other words, a commercial necessity for the sale would then arise, justifying the master in resorting to it.

P. 495:—The possibility of communicating with the owners must, of course, depend on the circumstances of each case, involving the consideration of the facts which create the urgency for an early sale, the distance of the port from the owners, the means of communication which may exist, and the general position of the master in the particular emergency.

Such a communication need only be made when an answer can be obtained, or there is a reasonable expectation that it could be obtained, before the sale. When, however, there is ground for such an expectation, every endeavour, so far as the position in which he is placed will allow, should be made by the master to obtain the owner's instructions. (See the judgment of the Judicial Committee by the Lord Justice Knight Bruce, in the case of *The Bonaparte*¹; the corrected passage is given in the report of *The Cargo ex Hamburg*.²)

COLEQUID MARINE INSURANCE. CO. V. BARTEAUX³

74. The principles of the above cause were maintained in this appeal, as will appear in the following remarks.

SIR HENRY S. KEATING, p. 324:—With reference to the law upon the subject, there seems now to be no doubt whatever; and it cannot be questioned that the master, under circumstances of stringent necessity, may effect a sale of the vessel so as thereby to affect the insurers. That he can only do so in cases of such stringent necessity has been laid down in a great variety of cases unnecessary more particularly to be referred to, as they are well summarized in the work of Mr. Parsons, at p. 147, where he also takes the distinction between the rule that a sale is justified by stringent necessity only, and what was sometimes supposed to be a rule, that the sale would be justified if made under circumstances that a prudent owner uninsured would have made it. He distinguishes between the two and establishes upon satisfactory authority that whilst what a prudent owner would have done under the circumstances if uninsured may illustrate the question as to how far there was a stringent necessity for selling, yet that the rule is that there must be a stringent necessity. See *ACQUIESCENCE: iisdem verbis*.

¹ 8 Moore P. C. 459, 473.

² 2 Moore N. S. 320.

³ Nova Scotia, 1875 March 18, L. R. VI P. C. 319.

TRANSFER OF BRITISH SHIPS.CHASTEAUNEUF V. CAPEYRON ¹

75. The transfer of a British ship is not governed by the rules applicable to moveables in general, but by the express provisions of the Merchant Shipping Act, which make a clear distinction between the legal estate and mere beneficial interest in a British ship.

76. Upon the sale of a ship by the sheriff, or by order of the High court of Admiralty, the vessel becomes the property of the purchaser, but unless the purchaser get a bill of sale from the Sheriff, the Marshall or the Commissioner, as the case may be, in order to entitle him to be registered as owner, the Registrar cannot consider him as owner.

RENEWAL OF PILOT'S LICENSE.MAN V. MALCOMSON. THE "BETA" ²

77. By the 374th section of the Merchant Shipping Act (17-18 Vict., c. 104), it is provided, that no license granted by the Trinity House shall continue "in force beyond the 31st day of January next ensuing the date of such license; but that the same may, upon the application of the pilot holding such license, be renewed on such 31st day of January in every year, or any subsequent day." A pilot having renewed his license on the 20th day of January was held to be within the intention of that provision, so as to be in operation and effect on the 6th of May following.

SHIP'S LICENSE.BALSTON V. BIRD ³

78. Under 53 Geo. 3, ch. 155, masters of ships are obliged to obtain a license to trade between the different ports in the East Indies.

A license allowing the master to proceed from Calcutta to Canton to take in a cargo, and to deliver it on shore at Calcutta, or at any intermediate port in the course of the voyage, cannot justify a voyage from Calcutta to Canton and from there to the Cape of Good Hope, and the ship was held to have been legally seized.

See INTERNATIONAL LAW: rules governing ships on the sea.

MINORITY**CIVIL STATUS AND RELIGION OF MINORS.**SKINNER V. ORDE ⁴

79. A child, in India, under ordinary circumstances, must

¹ Mauritiis, 1882 Jan. 21, L. R. VII Appeal Cases 127.

² Admiralty, 1865 Feb. 9, III Moore N. S. 23.

³ Cape of Good Hope, 1828 June 21, 1 Knapp 121.

⁴ Allahabad, 1871 Dec. 12, VIII Moore N. S. 261.

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be presumed to have his father's religion, and his corresponding civil and social status, and it is the duty of a guardian to train his infant ward in such religion and principles.

FAMILY COUNCIL.**CHAPMAN V. THE ORIENTAL BANK CORPORATION ¹**

80. A family council to authorize an emancipated minor to give a hypothec on his real property is properly called by an attorney authorized by the minor, his mother and the curator to the minor; and the homologation of the decision of the family council by a single judge in chambers is sufficient.

SALE OF MINORS' PROPERTY.**THE BANK OF MONTREAL V. SIMSON ²**

81. A sale by an insolvent tutor of bank shares, the property of his ward, without any of the formalities required by law, was declared null and void.

82. The circumstances of the pecuniary position of the tutor were known to the authorities of the bank, who had received notice from the sub-tutor that the tutor had not authority to sell the shares. The bank, however, allowed the transfer, at the instance of the tutor, and paid the dividends to the transferees.

The Judicial Committee held that by the *Ordonnance d'Orléans* (January 1560, art. 102) the bank shares did not fall within any class of property which a tutor had power to dispose of without the sanction first obtained of a court of justice, and that the sales by the tutor were absolutely void.

83. The sale of the bank shares was not voidable only, but absolutely void from the time of the sale, and therefore, it was not necessary to make the transferees of the shares parties to the action.

84. The burden of proof falls on the tutor to show that what he sold fell within the property which a tutor is entitled to dispose of without the sanction of a court of justice.

85. The power of *administration* does not necessarily include the power to sell. As regards a tutor, administration includes management, but does not include sale, unless to the limited and qualified extent allowed by law with reference to the administration of the property of the minors.

¹ *Mauritius*, 1864 Nov. 30, 11 Moore N. S. 462.

² *Lower Canada*, 1861 July 5, XIV Moore 47.

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SIR JOHN ROMILLY, p. 441 :—The facts are not in dispute, and the question to be determined is the extent of the authority of a tutor over the property of his ward : whether that authority extended to selling the bank shares in question, and if it did not so extend, whether the act can be considered as void in itself, or only voidable. For the purpose of determining this question, it is necessary to ascertain what the law of France was, in this respect, prior to the great French revolution, which is the law which now obtains in Lower Canada. This law is the old civil law as applicable to this subject, regulated, nevertheless, by article 102 of the *Ordonnance of Orléans*, promulgated in January 1560, during the reign of Charles IX, and which modified, to some extent in this respect, the civil law which had previously prevailed on this subject.

The general power of the tutor over the ward and his property was that of a parent "*domini loco habetur*;" he could get in the property of the minor, and give a discharge for payments of debts due to him; in all matters relating to the tutelage the act of the tutor bound the minor. The power of the tutor to dispose of the property of the minor was originally, by the civil law, unlimited, unless accompanied by fraud; and in some cases he was compulsorily required to realize by sale all property that might by possibility suffer by being kept, such as houses, lest they should be burnt.

This general power was limited first by the law of *Alexander Severus*, which forbade the sale of "*prædia*" belonging to the ward, and afterwards by the edict of *Constantine* which prohibited the sale not merely of "*prædia*" without judicial authority, but even the sale of any other property of the minor, unless such as was liable to perish by use, and also the superfluous animals. And this was the law obtaining in France in the earlier part of the sixteenth century, when it was further regulated by the *Ordonnance of Orléans* in January 1560, by which, in article 102, it is enacted, that tutors and curators shall be bound, as soon as they have made an inventory of the property of their wards, to sell, "*par autorité de justice*," the perishable moveables, and to lay out the produce, under the advice of relations and friends, in the purchase of "*rentes ou héritages*," that is, in the purchase of property producing a permanent income. It is to be observed, therefore, that the *Ordonnance of Orléans* recognizes the law then subsisting in France in this matter to be regulated by the edict of *Constantine*, which prohibits the sale of any property of the minor except those moveables which perish by use and the superfluous animals; and then, in order to extend the power of sale of the tutor not merely over such moveables as are within the class specified by the edict of *Constantine*, but also over those which are liable to decay or risk from other causes, enacts that the tutor shall have power to sell all "*meubles périssables*," but these only under the authority of the law "*par autorité de justice*."

By "*meubles périssables*," as distinguished from moveables which perish by use, we understand to be meant all property which is liable to deteriorate from permanent causes. It is obvious that an *Ordonnance* which declares that for the sale of perishable property

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of a moveable character the sanction of a court of justice shall be required, infers that moveable property which is of a permanent character, and producing a permanent income, cannot be disposed of without such authority.

The effect and extent of the *Ordonnance of Orléans* on the power of a tutor over the property of his ward has been the subject of much discussion by the writers and jurists versed in French law, and has also been the subject of many judicial decisions, several of which have been cited and commented upon in their works. After carefully examining the various authorities and the writers on this subject prior to the enactment of the French codes, and testing their opinion by the decided cases cited in their works, we are of opinion, though passages may be found dispersed through their writings on which arguments may reasonably be founded leading to opposite conclusions, that no considerable or inconciliable diversity of opinion appears to exist between them, and that the result of the law, so far as it is applicable to the case before us, may be thus stated:—

The tutor's duty is to make an inventory of all the property of his ward, and to take an administrative care in the protection and management of it; but without the sanction of a court of justice having being previously obtained, his power does not extend to selling any portion of the immoveable property of his ward, or any portion of that property which is of mixed character; and, further, that his power is also restricted from selling any proportion of the moveable property of the ward without the intervention and previous sanction of a court of justice having been first obtained, except such portion of it as is unproductive of revenue, and such portion as being also of a perishable character will necessarily either cease to exist or will, from permanent causes, become deteriorated in value at the period of time when the ward shall attain his majority; and even this qualified power of disposing of property of an unproductive character is still further limited by a restriction from disposing of articles in the nature of heir-looms, as to which an hereditary "*pretium affectionis*" is attached. Although this is an incomplete statement of the law, it is, we think, accurate, and sufficiently comprehensive for the purposes of this case.

It has been contended on behalf of the appellant, that as in the civil law the original principle was that the tutor stood in the place of the father, and was *dominus* of the property of the ward and, as such, had power to dispose of all his property, the case must be considered as one in which the burthen of proof lies on the respondent to establish that the property in question falls within the range of the various classes of property which, by regulations made subsequent to the original law, should be excepted from the general rule which gave the tutor complete control: these exceptions, it is said, were of three sorts: first, immoveable property, and next, *quasi* immoveable property, which was called "*immeubles fictifs*;" and, thirdly, moveable property of a peculiar value as possessing a "*pretium affectionis*," and being in the nature of heir-looms; that these were only three classes of property excepted from the control of the tutor. That all property not falling within one of these three

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classes is still subject to the general control of the tutor, and that bank-shares do not fall within the description of any one of these classes of property, and, consequently, that the power of the tutor over them was absolute and the right of the respondent to recover them gone.

But this is not the view we take of this case: we think that the edict of Constantine changed the law on this subject, and exempted all property of the ward from the saleable control of the tutor, with the exception of the property there mentioned, and that, if the matter had remained as fixed by the edict, such must be considered to have been the law of France prior to the year 1560. And we also think the Ordonnance of Orleans has only altered the law in this respect by extending the power of sale by the tutor over the moveable property of the ward there specified, and this only with the previously obtained sanction of a court of justice.

Although the various authorities cited to us are susceptible of various meanings and without some qualification of the generality of their terms are not entirely reconcilable, yet this is, we think, the general effect of them; and this view is confirmed by the cases cited and commented upon in such authorities; as an instance of which one case which was cited before us may be referred to, where an office belonging to the ward, which had during the vacancy caused by the death of her father lapsed to the profit of the State, had been disposed of by the widow as the guardian of her daughter, the sale was annulled on the ground that the office was in the nature of "*immeuble fictif*."

But the case proceeds to say:—"Il en serait de même s'il s'agissait d'une chose purement mobilière, mais d'une grande valeur, et qui formerait, pour ainsi dire, toute ou la majeure partie de la succession."

If this be the correct view of the case, the burden of the proof falls on the appellant to show that the bank shares fell within the property which De Lisle, as tutor, was entitled to dispose of without the sanction of a court of justice.

It is always to be borne in mind that, as the wants and exigencies of society increase, new denominations of property will come into existence, to which the observations made and rules laid down in previous cases do not precisely apply, but we entertain no doubt upon a full review of this subject, that the bank shares in question do not fall within any class of property which the tutor has power to dispose of without the sanction of a court of justice. It was not, in our opinion, open to the tutor to speculate upon, or to decide for himself or for his ward, whether such shares as these were likely to rise or fall in value. We think that no distinction can be taken in this respect, and so far as the power of the tutor is concerned between the shares in the Montreal Bank and shares in the Company of the Bank of England, and stock in the English or foreign funds, and that the sale and realisation of such property requires the interposition and sanction of a court of justice, and the re-investment of the proceeds in property producing a permanent income according to the terms of the Ordonnance of Orleans.

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It has also been argued before us that the power of the tutor is by all the authorities held to include administration, and that administration necessarily includes sale. But we dissent from that argument; we think that the supposition that the administration of the affairs of a ward necessarily involves the sale of any portion of his property, is one derived from the ideas which in England attach to the word "administration," which in its technical sense applies only to a legal personal representative; but this is, in our opinion, wholly distinct from the functions of a tutor, and which, in order to avoid confusion, it is essential to keep distinct. Administration, as applicable to a tutor, includes management, but does not include sale, unless to the limited and qualified extent already pointed out.

It is partly for this reason that we have not thought it necessary or desirable to comment on the authorities cited from the decisions of the English tribunals, and the arguments deduced from them: they have not, in our opinion, any relevancy to the matter to be decided in this case.

Neither have we thought it of any moment to consider the articles in the present French code, or the discussions in the conferences which took place when that code was framed, except so far as these conferences illustrate any ambiguous point in the earlier law which up to the time obtained in the Kingdom of France. So far as these latter have any bearing on the subject, they concur in bringing us to the conclusion already stated, that by the law of France prior to that period, and which is that now in force in the Province of Lower Canada, it was not in the power of the tutor to sell the bank shares without the assistance and sanction of a court of justice.

The next question to be considered is the effect of the sale which has actually taken place, and the transfer of these shares to persons who are strangers to the record.

It is argued by the counsel for the appellant, even on the assumption that the tutor exceeded his authority, still that the sale was good; and that, assuming that the transfer ought not to have been made, still that being made, it is valid, and that the act can only be treated as a voidable transaction, and not as one actually void, and that, if it be only voidable, the persons who bought the shares, and in whose names they now stand, ought to have been brought before the court to answer to a matter in which they were so materially interested.

We are of opinion, however, that the act of the tutor, exceeding the limits of his power and the scope of his authority is actually void. The authorities on this subject, amongst the authors cited to us, are conclusive on this head. It is not necessary to refer to them in detail, but it may be useful to refer to one passage, where the principle which governs them and the reasons for it appear to us to be well and lucidly stated by Pothier, in his "*Traité des Personnes*," Part I, titre VI, article III, section 2.

After stating in this passage that a minor can, after his minority is over, reclaim immoveable property sold by the tutor, Pothier observes that he can do so without having "besoin pour cela de lettres de rescission; car on n'a besoin de ces lettres que pour revenir

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contre son propre fait. Un mineur a besoin de lettres contre le fait de son tuteur, parce que le fait de son tuteur est censé son propre fait; mais cette règle n'a lieu qu'à l'égard des choses renfermées dans le pouvoir d'un tuteur c'est-à-dire, qui concernent l'administration du tuteur. Or, cette vente faite par le tuteur, étant une chose qui excède les bornes du pouvoir du tuteur, n'est pas plus à cet égard le fait du mineur que ne le serait le fait d'un étranger qui se serait avisé de vendre cet immeuble. Le mineur n'a donc pas plus besoin de lettres pour revendiquer cet immeuble, que s'il avait été vendu par un étranger sans caractère; et le tuteur lui-même dans les choses qui excèdent son pouvoir, doit être regardé sans caractère."

This passage, besides bearing on the point now considering, is useful also as pointing out that in the sense in which the word "*administration*" was employed by the French Jurists on this subject, it did not include in it the idea of sale, which is derived from our English notions on this subject. The observations just read are made, it is true, by Pothier with relation to the sale of immoveable property, but the principle is the same with respect to all property sold by the tutor which he had no power to sell, and which the authority of a court of justice could alone entitle him to dispose of. When this excess of power is once established, then the sale is in fact the sale of a stranger, and the act here complained of is as if a stranger had sold these shares, and had then, by fraud or forgery, induced the Bank to make the transfer of them in their books. In that case they would still remain liable to the rights of the minor, both for the shares themselves and for the dividends which accrued on them.

Though it cannot, in our opinion, affect the ultimate decision of the case, which must rest on the principles already stated, it is not an immaterial circumstance in the consideration of this case, that the sub-tutor, Robert Simson, on the 29th of September, 1846, a year and a-half before the first sale of shares took place, gave regular and formal notice to the Bank that DeLisle, the tutor, had no authority to sell the shares, and that the circumstances of the ward were such that the disposal of them was not required for her benefit. The distressed circumstances of DeLisle seem also to have been notorious, and likely to be known to the Bank, in which case it was probable that any sale by him would be for his own sole advantage.

The functions and duties of the sub-tutor seem to be not very clearly defined; he has no power of actively interfering, but his duty seems to be to watch over the conduct of the tutor, and endeavor to prevent injury being inflicted on the person or property of the ward. Nothing could be more formal or precise than the notice served by him on the Bank in that character, which is set up in p. 26; and as the Bank have thought fit, on their own determination, without even giving notice to the sub-tutor, or to the friends of the minor, of the attempt the tutor was making to sell his ward's property, to allow the transfer in their books of all these shares by the tutor to mere strangers, they must now take the consequences, their Lordships being of opinion that the act of making that transfer was, so far as regards the minor, merely nominal, that it took

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away no property from her, and that the decision of the Superior court of Lower Canada and of the Court of Queen's Bench is correct, and must be affirmed, with costs; and they will humbly advise Her Majesty accordingly.

SUITS IN MINORS' NAMES.

KERAKOOSE V. SERLE ¹

86. In Madras, the protection of infants' interest is left to persons who may be willing to come forward at their own risk.

87. There is also a general order of the Supreme court ordering that: "Whenever it shall appear, that the property of any infant is unprotected, and not secured for his or her benefit, the Registrar shall, with the previous consent of the court, or a judge, institute proceedings on behalf of such infant, for the purpose of protecting his or her person or property." Notwithstanding this order of the Supreme court, the Privy council held that it was against public policy to allow the Registrar of the court to institute such suits, as he was personally interested, receiving, by reason of his office, fees upon the proceedings in the suits, and a commission upon the amount of the money paid into court.

MORTGAGE

See HYPOTHEC.

MORTMAIN**IN BRITISH HONDURAS.**

JEX V. MCKINNEY ²

88. The English statute called the "Mortmain Act" 9 Geo. 2, ch. 36, is not in force in the colony of British Honduras.

MUNICIPAL COUNCIL

See CORPORATION (MUNICIPAL).

¹ Madras, 1844 Nov. 30, IV Moore 459.

² British Honduras, 1889 Feb. 8, L. R. XIV Appeal Cases.

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USE OF FAMILY

DU BOULAY v. DU BOULAY ¹

1. According to French law in force in *Saint-Lucia*, and also under the law of England, a man has not such an exclusive property in his family name as to entitle him to bring a civil action to have it declared that the name exclusively belongs to him, and for an injunction prohibiting another person, who had assumed his name, from bearing or using it. The French *Ordonnance* of 1555, not having been registered, never became part of the law of *France*, affecting her colonies. The French *Ordonnance* of the 11th of April 1803, prohibiting a change of name, except under certain prescribed formalities there enacted, not having been introduced in *Saint Lucia*, forms no part of the law of the Island.

2. Long acquiescence by the members of a family in the assumption of their family name by a stranger would, even if such an action lay, operates as a bar to a suit to prohibit him from bearing or using such name so acquired by reputation.

¹ Saint Lucia, 1869 March 11, VI Moore N. S. 31.

USE OF FAMILY

LORD CHELMSFORD, p. 46: — The question to be determined upon this appeal is, whether an action of this description is maintainable under the French law, which at the present time is the governing law in the Island of Saint-Lucia.

When a judge is called upon to decide a question depending upon foreign law, there is always some danger of his being influenced by notions derived from that law which he is in the daily habit of administering. In this country we do not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger. The right to the exclusive use of a name in connection with a trade or business is familiar to our law, and any person using that name, after a relative right of this description has been acquired by another, is considered to have been guilty of a fraud, or, at least, of an invasion of another's right, and renders himself liable to an action, or he may be restrained from the use of the name by injunction. But the mere assumption of a name which is the patronymic of a family, by a stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our law affords no redress.

P. 49: — Upon the first question, the learned counsel for the appellants undertook to prove that by the old French law which prevails in Saint-Lucia, a family had a property in their patronymic, and might prevent any person calling himself by their name who had no right or title to do so. For this purpose he quoted a modern work, the *Dictionnaire du Notariat*, s. 3, tit. "*De la propriété des noms*," where it is said, "*Le nom que chaque individu porte est pour lui une propriété. Il a le droit de s'opposer à ce qu'il soit pris par un autre. L'usurpation d'un nom donne lieu à une action devant les tribunaux. Cette action est purement civile.*" The learned counsel, upon being pressed for some instance of an action of this description having been brought under the old French law, confessed that he had no early precedent to produce. The only cases which he mentioned were two, which are to be found in the record of the proceedings. One of them is the case of *De Lacarelle v. Darien de Lacarelle*, before the Tribunal of Ville-franche, in the year 1859, respecting which nothing is stated, except the opinion of the Tribunal, that a person who has the right to bear a name is entitled to prevent another from usurping it, without being compelled to account for the motive of his proceeding; and the other, *Lawless v. Pierre*, falsely called *Lawless*, before the Tribunal of Martinique, in the year 1860, which like the present, was the case of the assumption of a name after emancipation from slavery.

It is extremely doubtful whether, prior to the Ordonnance of 1555 to be presently mentioned, the assumption of a name by a person who had originally no right to call himself by it, was the subject of any proceeding, personal or civil.

Merlin, in his *Répertoire de Jurisprudence*, tit. "Nom," s. 3, after stating that by the Roman law changes of names were absolutely free, says: "*Il fut un temps en France où conformément à cette loi on changeait de nom sans aucune solennité.*" He then gives a variety

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of instances prior to 1555, in which changes of name had been made without authority, and without any solemnity. He then proceeds, "*Mais comme cette licence de changer ainsi de nom et d'armes produisait les plus grands abus, le roi Henri II y remédia par une Ordonnance donnée à Amboise le 26 mars, avant Pâques, 1555, art. 9.*"

The right, therefore, to bring a civil action in Saint Lucia for the usurpation of a family name must be founded either upon this Ordonnance of 1555, or upon some law subsequently passed and introduced into the island. The Ordonnance of 1555 gives no right of civil action for an unauthorized change of name; and, according to *Merlin*, in the passages just cited, such an action could hardly have been previously maintained. The Ordonnance subjects the person changing his name without authority to penal consequences only. It says: "*Pour éviter la supposition des noms et des armes, défenses sont faites à toutes personnes de changer leurs noms, et leurs armes, sans avoir obtenu des lettres de dispense et permission, à peine de 1,000 livres d'amende, d'être punis comme faussaires et être exautorés et privés de tout degré et privilège de noblesse.*"

There seems to be great doubt whether this Ordonnance of 1555 ever had any practical operation, even in France. *Merlin*, in his *Répertoire*, tit. "*Promesse de changer de nom*," says, the Ordinance not having been registered, never became law in France. But *Dalloz*, in his *Dictionnaire*, tit. "*Nom et Prénom*," after mentioning this opinion of *Merlin*, says, "*Mais la jurisprudence est contraire à cette opinion.*" At all events, it is not shown that this unregistered Ordonnance ever formed part of the law of Saint Lucia. It is to be observed, that the chief justice of Saint Lucia founds his judgment in favour of the appellants upon a different Ordonnance, never referring to the Ordonnance of 1555 as having any existence, or, at least, as having any bearing upon his decision. He says, "In France, under the law *De mutatione nominis*, names were changed according to the whim or caprice of individuals without any solemnity or formality; but such an unrestrained license brought forth great confusion; names of living families were arbitrarily taken, and towards the commencement of the nineteenth century, on the 11th of April, 1803, a law was made to check that dangerous system." And he adds, "It is not amiss to observe that that law is not only still in force in this colony, but has been retained entire by the modern legislators of that country."

Notwithstanding the opinion of the chief justice, that the Ordonnance of 1803 is in force in Saint Lucia, it may fairly be questioned if it ever became part of the law of the island before it was taken by this country on the 23rd of June, 1803. On that day a proclamation was issued which assured and guaranteed to the inhabitants the full enjoyment of their property, under the laws which existed in the island at the time immediately prior to the last cession.

It is not very probable that the Ordonnance of 1803 was one of these laws. It was passed in France a little more than two months before Saint Lucia was brought under British dominion, and not being of any peculiar local importance, it was not likely in the critical position of the French West Indian colonies at this juncture

USE OF FAMILY

that any care would be taken to transmit it, in order that it might form part of the law of the island.

If the chief justice is right in saying that this law was made to prevent persons arbitrarily taking the names of living families, it would seem to show that before 1803 no civil action could be brought, or, at all events, that none was ever brought, to protect a family name from usurpation.

If the law of 1803 is out of the question, it is difficult to see upon what other foundation the appellants can rest their right to maintain the action.

The Ordonnance of 1555, or one of a similar description made in 1629, was the only law upon the subject of changes of name at the time of the French Revolution. That Ordonnance fell with the kingly authority. In 1794, during the revolutionary government, an Ordonnance was passed which absolutely prohibited any change of name, but the learned counsel was unable to show that this Ordonnance, any more than that of 1803, ever had the force of law in Saint Lucia. He failed altogether in his endeavour to prove that the existing law of the island entitled the appellants to maintain their action, whether he relied upon the old French law independently of the Ordonnances, or upon proof that the Ordonnances ever formed part of the law of Saint Lucia, or, even if they did, that they gave a family a right to proceed by civil action against a person calling himself by the family name without authority, and to compel him to discontinue to use it. Their Lordships are unwilling to dispose of the case without advert- ing to the question arising from the delay of the appellants in instituting their suit. Supposing an action of this kind to be maintain- able, there must be some reasonable limit within which a family ought to be bound to proceed.

In the present case, the family of Du Boulay, resident in Saint Lucia, could not have been ignorant that for ten years the respon- dent had been carrying on business openly under the name of Du Boulay, that he had been recognized by that name in public acts, and that he had undoubtedly acquired the name by reputation. At what time some of the appellants were absent from Saint Lucia, and when they returned, is left in uncertainty; but the head of the family appears to have been continually resident in the island, and no sufficient reason is assigned for his not taking earlier steps to protect the family name from respondent's alleged unauthorized as- sumption of it.

NOTARY

AUTHENTIC WRITINGS. See EVIDENCE : *iisdem verbis*.

NOTARIAL DEED

FORM.

HAMEL V. PANET¹

3. In a notarial deed (this was a mortgage) there were sufficient grounds for supposing that pages 7 and 8 of the

¹ Quebec, 1876 Nov. 18, L. R. II Appeal Cases 121.

FORM.

deed, which appeared to be in a different handwriting from the other pages and consisted of half sheets of paper, had been written after pages 9 and 10; all the pages being fastened together only with a string. It appeared also that the notary stated that the deed was passed and done at the place where he signed it himself, instead of naming the place where the parties signed it.

Their Lordships reversed the decision of the court of Queen's Bench, and held that the deed was nevertheless authentic, as there were no irregularities sufficient to annul it.

LORD SELBORNE, p. 147:—That brings them to the question of form; and the first point of form is connected immediately with this last topic, as to the condition of the deed and the two pages 7 and 8 which are supposed—and for this purpose their Lordships assume that the grounds are sufficient for so supposing—to have been written after the writing of all or part of what is on pages 9 and 10. Is there any law which deprives the act of its authentic and probative character because those pages are not initialed? Their Lordships are unable to discover any such law. The French law contained in the Ordonnance of François I, of October, 1535, to which Mr. Westlake referred, says that in instruments, which their Lordships assume to include such an instrument as this, there shall be no blank left; everything shall be in writing *d'une datille*. The learned counsel have asked us to infer that that means the same thing as the expression *d'un seul contexte* which occurs in a recent French law; but their Lordships are not satisfied that the commentaries on the recent French law, or the text of that law were intended to be interpretative of the word "*datille*" in the Ordinance of François I; and unfortunately neither the counsel nor any dictionaries which their Lordships have been able to refer to have supplied the required information on that point. Well, at all events, it says it is to be written *d'une datille* without making any *apostille* in the margin or the text, or any interlineation, or leaving any blank; and if there be any such thing as that which ought not to be, that is to say, an *apostille*, interlineation, or blank, it must be repaired and set right at the end of the note; in fact, it should be initialed or verified by some form of certificate on the part of the notary. Whether there is anything here to which it requires the notary's initials or certificate to be applied, their Lordships say they find no *apostille* in the margin or in the text, and no interlineation; for they cannot regard the addition of a particular page or sheet containing words occurring in their proper order and manner in the context of the deed, without interrupting any order which existed before and without changing the effect of any prior coherent and rational context, they cannot regard that as an interlineation either in the letter or in the spirit, or as an *apostille* in the margin of the text, whatever be the proper and exact meaning of that word.

Then comes the Canadian law, the Edict of the Council of State of 1733, which says that the notaries shall be bound to put their signa-

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tures, amongst other things, to approve and initial all *renvoi* (it is admitted this is not a *renvoi*) and erasures by the parties, and so on. The letter of that law does not strike this case, nor does the spirit, as their Lordships think. The mere fact that it is written in a different handwriting,—the mere fact that this part of the only instrument which ever was brought into existence may have been manually written after that which follows it, the two together constituting on the face of the instrument one context for the intended purpose,—seems to their Lordships not to come within the law at all

The principle of these laws is the same with that which we are very familiar with in the case of wills, where that which appears to have been added, or altered, by way of erasure or interlineation, requires authentication, and otherwise would be presumed to have been subsequent to the execution of the instrument; the instrument without it being sensible and adherent. *Savère v. Savère*, *Dalloz Recueil* 1851, s. 2, p. 84

P. 149:—Then we come to the other objection of form, with respect to the place stated upon the face of the deed as the place of passing the instrument. It is stated upon the face of the deed that it was passed in the parish of *Saint Ambroise*, in the house of the son. Upon the subject of the place, the law relied upon is the Ordinance of Blois, art. 167:—"Notaries shall also be bound to state in their contracts the quality, abode, and parish of the parties, and the witnesses named in them; the house where the contracts were passed," and so on. Now, if their Lordships had to determine, as a mere question of construction, the effect of those words, "the house where the contract shall have been passed," they would be obliged to say, that the terms of that law do not expressly refer to a case where the acknowledgment or signature of some of the parties has been taken at one house, and the acknowledgment or signature of other parties at another house, and where the notary signs and passes the act, as far as his signature is the mode of passing it, after the last acknowledgment or signature. If their Lordships were obliged to express an opinion on those words, they are by no means prepared to say that they are not susceptible of the construction, that the proper place to be certified as the house where the contract is passed is that in which the notary completes the contract by affixing his own signature, which in this case was done; and, if that were sufficient, it would remove the objection. *Evanturel v. Evanturel*, L. R. 2 P. C. 462.

NULLITY

See CHAMPERTY AND MAINTENANCE, CONTRACT, EVIDENCE, INSOLVENCY, HYPOTHEC, LEGACY, LESSOR AND LESSEE, MARRIAGE, SALE, TESTAMENTARY EXECUTOR, WILL.

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See PUBLIC NUISANCE.

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OFFICERS.

ACTION AGAINST GOVERNMENT OFFICER FOR TORT.

ROGERS V. DUTT ¹

1. The appellant was sued in damages for an act done in his official capacity as Superintendent of Marine, under the government. The declaration did not allege malice. The action was held not maintainable, but it would have been maintainable if malice had been alleged and proved.

2. If the government, by its agent, commit an illegal and damageable act, the agent is personally responsible. The government, in such cases, is morally bound to indemnify its agent, but, at all events, the right of the party injured to compensation is not subject to this consideration.

DR. LUSHINGTON, p. 103: — For if the act which he did was in itself wrongful as against the plaintiff, and produced damage to him, he must have the same remedy by action against the doer, whether the act was his own, spontaneous and authorized, or whether it was done by the order of the superior power. The civil responsibility of the supreme power for tortious acts could not be maintained with any show of justice if its agents were not personally responsible for them.

¹ Calcutta, 1860 July 30, III Law Times N. S. 160.

ACTION IN ASSUMPSIT AGAINST GOVERNMENT OFFICER.

PALMER V. HUTCHINSON¹

3. No action in *assumpsit* lies, before the ordinary courts, against a public officer of the government in his official capacity; the proper recourse is by petition of right.

4. The action was an *assumpsit* against Her Majesty's Deputy Commissary General and for general damages for breach of contract. The defence was an exception to the jurisdiction of the court, which was maintained.

SIR BARNES PEACOCK, p. 625:—The crown, by virtue of its prerogative has a right to sue by information in the name of the attorney general and also has a right to sue in the Admiralty court in the name of the procurator general, but in the present case the chief justice treats the plaintiff as attempting to sue the imperial revenue by making a public officer a defendant in his official capacity. But this right of the crown affords no support for the proposition that the government revenue may be reached by a suit against a public officer in his official capacity.....

Their Lordships are clearly of opinion that the Deputy Commissary general cannot be sued either personally or in his official capacity upon a contract entered into by him on behalf of the Commissariat Department. He is not a corporation and he has no property or assets in his official capacity, which could be seized or attached in execution of a decree against him in that capacity, and it is clear that no portion of the government revenue, whether allocated to a special purpose or not, could be seized in execution under it. The law upon the subject has been clearly laid down in several cases. In the case of *Macbeath v. Haldimund* which was an action against the governor of Quebec for military stores and supplies provided under his order for the garrison of a fort, Lord Mansfield said: "The only question before the court is whether the defendant be liable or not in this action. If he be, the plaintiff must recover, if not, no consideration as to the plaintiff's remedy against any other person can induce the court to make him so. There is no colour to say that he is liable in his character of commander in chief; in a late case which was tried before me where one *Savage* brought an action against Lord North as First Lord of the Treasury in order that he might be reimbursed the expenses which he had incurred in raising a regiment for the service of government, I held that the action did not lie. So in another case of *Lutterloh* against *Halsey*, which was an action brought against the defendant who was a commissary for the supply of forage for the army and by whom the plaintiff had been employed in that service, the commissary was held not liable. In the present case, it was notorious that the defendant did not personally contract. The plaintiff knew at the time that he furnished the stores that they were for the use of government and afterwards made government debtor in his bills.

¹ Natal, 1881 July 15. L. R. VI Appeal Cases.

ACTION IN ASSUMPSIT AGAINST GOVERNMENT OFFICER.

In the case of *Gidley v. Lord Palmerston* it was held that an action would not lie against the secretary at war for moneys which he, as a public officer, had received and which he was authorized to pay over to the plaintiff's testator on account of his retiring allowance.

In that case, chief justice Dallas in delivering the judgment of the court said: "It is not pretended that the defendant is to be charged in respect of any express undertaking or agreement between him and the testator, or in respect of any other character than his public and official character of secretary at war. It is in that character and in that only that his duty is alleged to arise, being therefore a duty as between him and the crown only and not resulting from any relation to or employment by the plaintiff, or under any undertaking in any way to be personally responsible to him. The money received is granted by the crown subject only to the disposition or control of the defendant as the agent or officer of the crown and responsible to the crown for the due execution of the trust or duty so committed. There is therefore no duty from which the law can imply a promise to pay to the testator during his life or to his executor after his death, nor can money be said to have been had and received to the use of the testator, which money belonged to the crown, being received as the money of the crown and the party receiving it being responsible only to the crown in his public character. On this view of the case it appears to us that that this action cannot be maintained. Any funds which may be issued by government to the commissariat department for the service of the State stand upon the same footing as that above described with reference to the money received by the secretary at war. With reference to the remark of the chief justice that the case could be disposed of by having regard to the practice of the court, the forum of the *locus contractus* and of the action, their Lordships think it right to say that no practice of the court can confer upon it any power or jurisdiction beyond that which is given to it by the charter or law by which it is constituted.

COMMISSIONERS OF CROWN LANDS.**COMMISSIONER OF CROWN LANDS IN NEW SOUTH WALES ¹**

5. In New South Wales, the Commissioner of crown lands is a public officer holding his office during pleasure, and may be removed by the Governor General in council.

DOMICILE OF ENGLISH See **DOMICILE**: *isidem verbis*.

DISTRICT SURGEONS IN JAMAICA.**HILL V. THE QUEEN ²**

6. In Jamaica, the office of Surgeon of the district prison of St. Catherine is held during pleasure, at the discretion of the justices of the peace.

¹ New South Wales, 1858 June 14, XI Moore 288.

² Jamaica, 1854 Feb. 20, VII Moore 138.

DISTRICT SURGEONS IN JAMAICA.

7. It is a well established rule that the courts of law will not interfere by *mandamus* with the exercise of such discretion.

POLITICAL AGENTS IN HONDURAS.**HODGE V. THE ATTORNEY GENERAL OF BRITISH HONDURAS**¹

8. Under the constitution of Honduras, the Superintendent's assent or confirmation have been at all times necessary to give the force of law to measures passed by the Legislative Assembly; and no political agent with a salary could be appointed without his consent. An appointment made by the Legislative Assembly, against the will of the Superintendent, of a political agent to represent the colony in England, was declared illegal by the Judicial Committee, and the agent without any right to claim a salary.

SUSPENSION OF COURT OFFICERS.*In re GRANT*²

9. The appellant, an officer of the court, was a shareholder and director of the Union Bank at Calcutta. The board of directors made a yearly report containing deceptive statements, as to the state of the affairs of the bank. It was proved that the appellant was a party to the fraud and that he also availed himself of his position of director, to obtain credit to a considerable amount upon his personal security only, which, by the condition of the deed of co-partnership of the bank, amounted to a breach of trust. The Judicial Committee held that although no charge or imputation, with respect to his judicial functions, was brought against him, there were sufficient grounds for calling upon the court to protect the administration of justice, by suspending such officer for so misconducting himself.

OWNERSHIP

See PROPRIETOR.

ONUS PROBANDI

See EVIDENCE.

¹ Honduras, 1864 June 2, 11 Moore N. S. 325.

² Bengal, 1850 Feb. 19, VII Moore 142.

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PARLIAMENT

See LEGISLATURE, GOVERNOR.

PAROLE EVIDENCE

See EVIDENCE.

PARTITION

AU MARC LA LIVRE. See INSOLVENCY: *iisdem verbis*.

WHAT IS

MUIR V. MUIR ¹

1. Regular testamentary quarterly payments, by administrators having power to divide the estate, to an alimentary legatee in usufruct, are not equivalent in law to the final partition of the property of the estate.

COURTEAUX V. HEWETSON ²

2. A partition according to the *Coutume de Paris*, is a transaction perfectly distinct in its nature and consequences from a sale or exchange; and any act described as a sale, exchange, donation or any other title having for its object to put an end to indivision between the heirs or legatees, is a partition in law. *Code Civil*, arts. 2109, 1686, 1688; *Pothier, Vente VII*, arts. 6, 7; *Demolombe, Successions*, vol. III, p. 291; *Dalloz, Jurisprudence* (1849), Pt. 2, p. 184; *do do* (1845), pp. 376, 377; *Troplong, Privilèges et Hypothèques*, t. II, p. 346; *Pont, Privilèges et Hypothèques*, t. I, art. 270, p. 285, and t. II, sec. 933, p. 342.

CARTER V. MOLSON ³

3. The doctrine laid down in the above cause was maintained.

Where by a will a testator has declared the property bequeathed *insaisissable*, the property remains so, even against a mortgagee, and even where the debtor is in possession under a deed of sale from the executors of the testator, such a deed being considered as a partition and not as a sale.

See PARTNERSHIP: *iisdem verbis*.

¹ Quebec, 1873 Dec. 9, L. R. V P. C. 66.

² Mauritius, 1875 July 21, L. R. VI P. C. 407.

³ Quebec, 1885 July 4, L. R. X Appeal Cases, 664.

PARTNERSHIP

ASSETS ACQUIRED PENDING NEGOTIATIONS TO FORM

GORDON V. SCOTT ET AL.¹

4. Negotiations were pending between the respondents and the appellant, to admit the latter into their partnership. It was agreed between them that the wharf and premises upon which the partnership carried on their business, and which the firm were holding as tenants under a lease, should form part of the partnership property. Before the end of the negotiations and the signature of the deed of partnership, the firm acquired the wharf and buildings and paid off a mortgage which was on them. Later on, the firm having become insolvent, the first partners sold the immoveables and refused to account to the appellant for his share, alleging that the property had been bought and paid for by them individually and not by or for the firm.

The Privy Council held that the respondents having purchased this property during the negotiations for the partnership, and the consideration money paid by appellant for his share in such partnership being based upon the fact of the property being freehold, the purchase must be treated as being for the benefit of the partnership concern; and that the appellant was entitled to participate and share with them, in the freehold interest so acquired, by contributing to the sum paid by the firm for the purchase thereof, to the extent of his share in the partnership.

5. The respondents were chargeable with interest from the date of the receipt by them of the purchase money, at the rate of 8 o/o, the legal rate of interest allowed in the colony in the absence of any special contract.

PARTITION OF PROPERTY.

MACDOUGALL V. PRENTICE.²

6. The parties were in partnership, and their object was to buy mining properties and to form mining companies; the profits were to be divided in the proportion of three fourths to the respondent and the balance to appellant. In the division of the properties of the firm, made by a deed of agreement to settle litigation, the respondent received as his share one tenth of certain stocks in the Montreal Mining Company, but in consequence of a judicial claim of a third party against the partnership, he was deprived of this stock which passed into other hands and could not be delivered to him.

¹ New South Wales, 1858 Feb. 25, XII Moore 1.

² Quebec, 1885 March 25, VIII L. N. 163.

PARTITION OF PROPERTY.

The Privy Council held that, according to the agreement between the parties, the respondent was entitled to be indemnified to the full amount of this stock, out of the partnership assets.

7. Held, also, that the proper time to ascertain the value of the shares was not the date of the action, but the date of the deed of agreement by which the partners had settled their respective rights in the said stocks.

BIRMEY V. MUTRIE & AL.¹

8. Three partners were interested in the capital of the partnership in the following proportions, the appellant 40 per cent, the respondents 35 and 25 per cent respectively. The capital had increased each year by the addition of profits, the interest on their credit, and the rent of the premises occupied by the partnership, which was the property of the appellant.

The court held, in a suit to divide the assets of the firm, that the surplus remaining after payment of liabilities ought to be paid rateably between the partners, according to the respective amounts of capital standing to the credit of each partner at the date of the dissolution, and rejected the pretensions of the appellant asking for a direction that the surplus should be applied in payment of the original capital contributed by each of the partners, with interest.

9. The claims of each individual partner against the partnership are not partnership liabilities.

RESPONSIBILITY OF**SMITH V. URE.²**

10. A partnership is responsible for the full amount of a contract made by an unauthorized member of the firm, when the contract is within the object of the partnership, but this responsibility ceases when the other partners disclaim the contract. In such case the firm was held liable for all advances made in respect of the contract previously to the notice, and for all those made or to be made in consequence of liabilities which they had previously incurred.

RESPONSIBILITY OF NEW FIRM.**ROLFE & BANK OF AUSTRALASIA V. FLOWER.³**

11. The respondent was carrying on business in Victoria in partnership with others. The firm, while it was indebted

¹ British Honduras, 1889 Dec. 11, L. R. XII Appeal Cases 160.

² Grenada, 1833 Dec. 1, III Knapp 188.

³ Victoria, 1866 Feb. 1, XIV Law Times N. S. 144.

RESPONSIBILITY OF NEW FIRM.

to the appellants, was reconstituted by taking in a new partner, but no alteration was made in the mode of carrying on the business; the accounts were continued in the old books as if no change had taken place, and the existing liabilities were discharged or diminished either from the assets of the old firm, or from the funds of the new firm indiscriminately.

It was held that this was cogent evidence that the new firm had assumed the liability to pay the debts of the old firm.

12. Where creditors of an old firm know that the new firm has arranged to assume the debts of the old firm, and go on dealing and receiving payment of part of their debt out of the blended assets of the old and new firms, such creditors thereby discharge the old firm, and accept the new firm as their debtor.

LORD CHELMSFORD, p. 145 :—The question, however, is not to be decided upon probabilities, but upon evidence, although much evidence is not required to establish the assumption by the new firm of the debts of the old firm. Lord Thurlow, in *ex parte Jackson*, 1 Ves. Jun. 132, said, "If one man having debts takes another into partnership with him, a very little matter respecting these debts will make both liable." And Lord Eldon, in *ex parte Peele*, 6 Ves, 604, thought that "slight circumstances" might be sufficient to prove an agreement to undertake such a liability. The evidence in this case, however, appears not to be slight, but cogent, to fix the liabilities of the old firm upon the new. Not only was there a continuance of the former dealing of the old firm upon precisely the same footing and with the same books as before, but the liabilities of the old firm were regularly inserted in the balance sheets of the new, and the assets of the old firm credited as belonging to the new, without any distinction between them. Large sums of money also were paid out of the general assets of the firm in reduction of the debt of Flower, Salting & Co.; and the interest upon this debt was regularly charged in the annual balance-sheets of the partnership. It was said by the appellants, that all that was done in payment of the debts of the old firm was in the discharge of a duty assumed by the new firm as the agent of the old to receive their assets and discharge their liabilities. But the course of the partnership transactions scarcely admits of this argument, for if it were merely a case of agency it might have been expected that these assets and liabilities would have been kept separate and distinct from the partnership business instead of being blended and intermingled with it.

RIGHT OF PARTNER TO SUE ALONE.

AGACIO V. FORBES¹

13. A member of a firm in South America composed of several persons went to China to enforce his claim against

¹ Hong Kong, 1861 Feb. 4, IV Law Times N. S. 155.

RIGHT OF PARTNER TO SUE ALONE.

a debtor of the firm. A third party sent him a letter agreeing to advance the money to pay the debt by a draft payable in London, six months after date. Whereupon a receipt was given for the debt to the debtor. The draft not having been paid, the partner brought suit in his own name against the maker of the draft, but he was non-suited on the ground that the action should have been taken in the name of the firm.

The Judicial Committee set aside the non-suit, on the ground that the contract was made between the plaintiff and the defendant alone, although for the benefit of his firm, and the plaintiff had the right to bring the action in his name.

LORD CHELMSFORD, p. 157 :—He (Agacio) was at Hong Kong for the purpose of obtaining a settlement of the account due from Robinet & Co to his firm. His partner was absent in a foreign country and he was the person with whom alone either Robinet & Co., or Russell & Co., could negotiate for the arrangement of the debt. He had threatened to institute proceedings for its recovery. It was desirable that he should abstain from these proceedings, and Russell & Co having interfered for the protection of Robinet & Co., would naturally apply to Agacio to request a forbearance which depended upon him, and in consideration of it undertake to remit the debt to the firm. Under the circumstances the contract was clearly entered into with Agacio, the plaintiff himself, although the benefit of it would result to the firm. The nature of the consideration does not resemble that in the case of *Garrett vs Handley*. The agreement of Agacio to forbear to sue Robinet & Co., would be an important consideration, flowing entirely from himself and available to them. For Agacio undertaking for himself not to sue Robinet & Co., his partner could not maintain an action without his consent, and if the partner had brought an action in the name of the firm, Agacio might have released it.

POWERS OF PARTNERS.**WHITTLE V. MCFARLANE¹**

14. A partner has no right to charge a commission against his co-partner for the collection of a partnership debt, in which both of them are interested and *a fortiori*, he cannot charge interest on such commission.

THE BANK OF AUSTRALASIA V. BREILLAT²

15. In ordinary trading partnerships, each partner has the right to borrow money for the purposes of the firm. Their Lordships found the general power of partners in ordinary partnerships, and the restrictions upon such powers,

¹ Jamaica, 1830 Dec. 15, 1 Knapp 311.

² New South Wales, 1847 Dec. 14, VI Moore 152.

POWERS OF PARTNERS.

stated with great accuracy by Mr. Justice Story, in his treatises on partnership and on agency; and they declared that they willingly adopted his language and cited chap. VI, sections 124 and 125.

THE RIGHT HON. T. PEMBERTON LEIGH, p. 194:—That, in ordinary trading partnership, the power of borrowing money for partnership purposes exists, and that bills or notes given by one of the partners in the partnership firm, for money so borrowed, will bind the firm, is too clear to require any authority.

WHO IS A PARTNER.

MOLLWO, MARCH & Co. v. THE COURTS OF WARDS¹

16. To constitute a partnership, it is necessary that there should be an understanding explicit or implied to participate in the profits and losses.

17. The mere fact of participation in the profits is a strong test of partnership, and there may be cases where, from such participation alone, it may as a presumption, not of law, but of fact, be enforced; the relation depends on the real intention and contract of the parties.

SIR MONTAGUE SMITH, p. 233:—It was contended at the Bar, that whatever may have been the intention, a participation in the net profits of the business was, in contemplation of law, such cogent evidence of partnership that a presumption arose sufficient to establish, as regards third parties, that relation, unless rebutted by other circumstances. It appears to their Lordships that the rule of construction involved in this construction is too artificial; for it takes one term only of the contract and at once raises a presumption upon it. Whereas the whole scope of the agreement, and all its terms, ought to be looked at before any presumption of intention can properly be made at all.

It certainly appears to have been at one time understood that some decisions of the English courts had established, as a positive rule of law, that participation in the net profits of a business made the participant liable as a partner to third persons. (see this point ably stated by M. Justice *Blackburn*, in *Bullen v. Sharp*². The rule had been laid down with distinctness by Eyre, C. J., in *Waugh v. Carver*,³ and the reason of the rule the chief justice thus states: "upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of *Grace v. Smith*,⁴ and we think it stands upon fair grounds of reason."

¹ Bengal, 1872 July 6, IX Moore N. S. 214.

² Law Rep. 1 C. P. 109.

³ 2 H. Bl. 235.

⁴ 2 W. B. L. 998.

WHO IS A PARTNER.

The rule was evidently an arbitrary one, and subsequent discussion has led to the rejection of the reason for it as unsound. Whilst it was supposed to prevail, much hardship arose from its application, and a distinction, equally arbitrary, was established between a right to participate in profits generally "as such," and a right to a payment by way of salary or commission "in proportion" (to use the words of Lord *Eldon*) "to a given *quantum* of the profits."

This distinction was stated to be "settled" and was acted upon by Lord *Eldon* in *ex parte Hampes*,¹ and in other cases. It was also affirmed and acted on in *Pott v. Eyton* where *Tindal*,² C. J., in giving the judgment of the court, adopts the rule as laid down by Lord *Eldon*, and says, "nor does it appear to make any difference whether the money is received by way of interest on money lent, or wages, or salary as agent, or commission on sales,"

This distinction has always been admitted to be thus, but it may be observed that the supposed rule itself was arbitrary in the sense of being imposed by law and of being founded on an assumption opposed in many cases to the real relation of the parties; and when the law thus creates a rule of liability and a distinction both equally arbitrary, the distinction which protects from liability is entitled to as much weight as the rule which imposes it.

But the necessity of resorting to these fine distinctions has been greatly lessened since the presumption itself lost the rigid character it was supposed to possess after the full exposition of the law on this subject contained in the judgment of the House of Lords in *Cox v. Hickman*,³ and the cases which have followed that decision. It was contended, that these cases did not overrule the previous ones. This may be so, and it may be that *Waugh v. Carver* and others of the former cases, were rightly decided on their own facts; but the judgment in *Cox v. Hickman*⁴ had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties. It appears to be now established that although a right to participate in the profits of a trade is a strong test of partnership, and that there may be cases where, from such participation alone it may, as a presumption not of law but of fact, be inferred; yet that whether that relation does or does not exist must depend on the real intention and contract of the parties. It is certainly difficult to understand the principle on which a man who is neither a real nor ostensible partner can be held liable to a creditor of a firm: the reason given in *Grace v. Smith* that by taking part of the profits, he takes part of the fund which is the proper security of the creditors, is now admitted to be unsound and insufficient to support it; for of course the same consequences might follow in a far greater degree from the mortgage of the common property of the firm, which certainly would not of itself make the mortgagee

¹ 17 Ves. 412.

² 3 C.B. 32-40.

³ 8 H. L. C. 268.

⁴ 8 H. L. 268.

WHO IS A PARTNER.

a partner. Where a man holds himself out as a partner, or allows others to do it, the case is wholly different. He is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel. Again, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract. Numerous definitions by text writers of what constitutes a partnership are collected at the end of the introduction to Mr. Lindley's excellent treatise on this subject. Their Lordships do not think it necessary to refer particularly to any of them or to attempt to give a general definition to meet all cases. It is sufficient for the present decision to say, that to constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common.

SINGLETON v. KNIGHT¹

18. One partner of a commercial firm lent money on condition that the borrower, besides paying interest at six per cent, should make over one half of his profits to the firm to which the lender belonged.

It was held that this agreement did not constitute a partnership between the firm and the borrower, as one partner has no authority to enter, in the name of the firm, into a partnership with other persons, in another business.

PATENTS**RIGHT TO EXTENSION.***In re KAY'S PATENT*²

19. Extension of patent was granted although a suit was pending respecting the validity of the original letters patent.

*In re PATTERSON'S PATENT*³

20. A patentee entered into an agreement with certain parties to work the patent, but owing to disputes between them, the invention was not prosecuted until a short time before the expiration of the term of the letters patent, twelve years having elapsed during which no advantage resulted to the public from it. Under such circumstances, an extension was refused.

*In re HEATH'S PATENT*⁴

21. The circumstance of there being *lis pendens* respecting the validity of the letters patent, is not a good reason for the grant of an extension of the original letters patent.

¹ Quebec, 1888 July 31, L. R. XIII Appeal Cases 788.

² England, 1839 June 13, III Moore 24.

³ England, 1849 June 21, VI Moore 469.

⁴ England, 1853 Feb 8, VIII Moore 217.

RIGHT TO EXTENSION.*In re CARDWELL'S PATENT*¹

22. A patentee agreed, by deed, with a public company to grant them exclusive license to use his patented machine, and also covenanted with them to obtain, at the expiration of the term, a renewal of the patent for the same purpose. Under this deed the company alone used the patent. An application by the patentee for a prolongation was refused, on the ground that the agreement was contrary to public policy, and repugnant to the provisions of the statute 5th & 6th Will, IV, ch. 83 relating to prolongation of letters patent.

*In re MARKWICK'S PATENT*²

23. In applications to obtain an extension of time for letters patent, the principal facts which their Lordships require to be established and which the petitioner is bound to prove are the following: *first*, the merits of the invention; *secondly*, that the party interested has done all in his power to bring out the invention, and to turn it to advantage; and *thirdly*, that owing to circumstances beyond his control, he has been unable to obtain an adequate remuneration.

*In re BAKEWELL'S PATENT*³

24. Non-use of a patent during the term of the letters patent, is not a conclusive ground against an extension of the term, but such fact amounts to a strong presumption that the invention is not useful. This presumption, however, may be rebutted by evidence showing the utility of the patent.

25. The fact that the invention was of such a nature that it could only be carried out by a company which could not be formed, is not sufficient to rebut the presumption against the practical utility of the patent.

*In re HILLS' PATENT*⁴

26. In an application for prolongation of the term of letters patent, the Judicial Committee will not try the validity of the patent, and though in general they will not enter into questions of doubtful validity, yet they will not recommend an extension of a patent which is manifestly bad. In determining whether to recommend an extension, though the validity of a patent may not be directly impeached, yet with respect to the novelty and the utility of the invention, the

¹ England, 1856 Dec. 1, X Moore 488.

² England, 1860 Feb. 8, XIII Moore 313.

³ England, 1862 Nov. 26, XV Moore 385.

⁴ England, 1863 July 7, I Moore N. S. 258.

RIGHT TO EXTENSION.

degree of merit to be attributed to the petitioner is to be taken into account, as well as the amount of remuneration received by him under the patent, deducting law expenses in maintaining his patent rights, as an extension is not of strict right, but rather of equitable reward.

In re NORTON'S PATENT¹

27. The grounds upon which letters patent may be extended were stated as follows in this cause.

THE RIGHT HON. SIR JOHN ROMILLY, p. 343:—The grounds upon which their Lordships grant extensions of patents, all have reference to the inventor himself. They are, in the first place, to reward the inventor for the peculiar ability and industry he has exercised in making the discovery; in the second place, to reward him because some great benefit of an unusual description has by him been conferred upon the public through the invention itself; or lastly, because the inventor has not been sufficiently remunerated by the profits derived from his strenuous exertions to make the invention profitable. All these grounds proceed upon the supposition that the invention is a new and useful invention. But when the inventor intentionally delays for a great length of time attempting to put it into practice, the grounds for prolongation of the patent which I have already mentioned cannot be relied on by him unless it be possible for him to show some reasonable excuse for the delay.

In some circumstances there might be a considerable ground of excuse arising from want of funds; the pecuniary difficulties in which the patentee had been involved in working out his invention might have placed him in a situation which had made it extremely difficult for him to obtain the means for taking the necessary steps to put the patent into operation.....

P. 344:—..... it must always be borne in mind that the assignee of a patent does not, unless under peculiar circumstances, apply on the same favourable footing that the original inventor does. The ground that the merits of the inventor ought to be properly rewarded, in dealing with an invention which has proved useful and beneficial to the public, does not exist in the case of an assignee, unless the assignee be a person who has assisted the patentee with funds to enable him to perfect and bring out the invention, and has thus enabled him to bring it into use.

In re LANCASTER'S PATENT²

28. Extension of four years granted, the patent being valuable and useful as improvements in the manufacture of fire-arms. A demand from the solicitor-general that leave should be reserved to the crown to use the patent without

¹ England, 1863 March 4, 1 Moore N. S. 339.

² England, 1864 June 16, 11 Moore N. S. 189.

RIGHT TO EXTENSION.

remuneration, as the government had already paid to the patentee large sums of money by way of bounty and reward, was refused. *Pettit Smith's Patent*, VII Moore, P. C. 133.

*In re TROTMAN'S PATENT*¹

29. To entitle a patentee to a prolongation of the term of letters patent, he must satisfactorily establish the amount of his profits.

*In re LAN'S PATENT*²

30. Where the utility of a patent has been tested by actual employment, for a period of fourteen years, although efforts have been made by the patentee to bring it into use, it raises a very strong presumption against its practical utility, which presumption can only be rebutted by the strongest evidence.

*In re McDUGAL'S PATENT*³

31. Where the specification of a patent described it as improvements in treating, deodorizing and disinfecting sewage and other offensive matter, and also for deodorizing and disinfecting in general, and as being composed of two ordinary well known chemical acids in combination, such acids being in common use for disinfecting purposes by the public before and after the letters patent, it was held, not to be an invention of such merit and utility as to justify an extension, to the detriment of the public in the use of known sanitary agents.

*In re JOHNSON'S PATENT*⁴

32. The principles established in the above case of Hill's patent approved.

*Re PITMAN'S PATENT*⁵

33. As the recommendation to the crown for the prolongation of the term of letters patent is a matter of discretion in the Judicial Committee, it is imperatively necessary that the petition for such prolongation should state fairly and fully everything relating to the patent; an omission to do so is fatal to the application.

34. In this application, the petition omitted to state that the patent was, in fact, a communication from a foreigner living abroad, who had previously to the English patent, patented the same invention in America, and that the

¹ England, 1866, III Moore N. S. 488.

² England, 1867 July 15, IV Moore N. S. 443.

³ England, 1867 Dec. 5, V Moore N. S. 1.

⁴ England, 1871 June 17, VIII Moore N. S. 282.

⁵ England, 1871 Dec. 4, VIII Moore N. S. 293.

RIGHT TO EXTENSION.

American patent had expired, though afterwards renewed in America. The Judicial Committee, under the circumstances, refused the application.

*Re BLAKE'S PATENT*¹

35. The fact of having dropped the patent obtained in a foreign country is a presumption against the public utility of the thing patented, and is sufficient for the Judicial Committee to refuse an extension.

*In re BRANDON'S PATENT*²

36. The statute 46 and 47 Vict. does not apply to patents granted before the Act. Nor has it changed the rule previously adopted by the Judicial Committee, namely that an applicant for a renewal is obliged to produce accounts of the profits he has received under foreign patents for the same invention.

RIGHT TO*In re CARD'S PATENT*³

37. In order to be entitled to letters patent, an applicant must show that he is the inventor. Upon an application it was proved that the article was not publicly and generally known prior to the application; but that some persons had systematically used an article identical with it, for several years prior to the application, and that the subject of the patent was little more than an application of a well known article in trade. Under such circumstances, their Lordships refused to recommend the confirmation of the letters patent, as it was not a case in which the statute was intended to apply.

*In re HONIBALL'S PATENT*⁴

38. The authority conferred upon the crown to confirm letters patent, is discretionary in the Judicial Committee to recommend or not a confirmation. The jurisdiction is one which is most cautiously and sparingly to be exercised, as the effect of a confirmation of letters patent is to give force and validity, by a *quasi* legislative authority to a grant of monopoly actually void, and to exclude from the use of the invention not only other subjects of Her Majesty in England, but even the first and original inventor, who may have actually brought it into public, though not into general use, before the patent was taken out. The consideration for

¹ England, 1873 Jan. 14, IX Moore N. S. 373.

² England, 1884 June 10, L. R. IX Appeal Cases 589.

³ England, 1848 Feb. 9, VI Moore 207.

⁴ England, 1855 Feb. 2, IX Moore 378.

RIGHT TO

such a monopoly is the benefit derived by the public from the communication of a new and useful invention.

39. Two conditions are required from a petitioner applying for a confirmation, to be established to the satisfaction of the Judicial Committee: *first*, that before the date of the letters patent, (the subject of application), the invention was not publicly and generally so used; and *second*, that the grantee of such letters patent believed himself the first and original inventor.

40. A first and original inventor means a person who could claim the merit of the first invention without reference to the user.

41. Although a party may believe himself to be the first and original inventor, yet he cannot shelter himself under wilful ignorance, but will be fixed not only with what he knew, but with that which he might have known had he made the inquiries which it was incumbent upon him to make.

PAYMENT**BY ERROR.**

COLONIAL BANK V. EXCHANGE BANK OF YARMOUTH.¹

42. A merchant being indebted to two banks, that is, to the respondents and to another bank in Halifax, remitted a sum of money to the appellants to be paid to the Halifax bank. By error, the appellants sent the money to a New-York bank who transmitted the same to the respondent, where credit was given to the merchant and the New-York bank was debited.

The Judicial Committee held that this was not payment, but money remitted by appellant by mistake, and that this latter had sufficient interest to claim by an action the money from the respondent.

DANIEL V. SAINCLAIR.²

43. It has been held that money paid under a mistake of law cannot be recovered, and that, under certain circumstances, the giving credit in an account may be treated as so far equivalent to payment, as to prevent sums of money wrongly credited being made the subject of set off. *Skyring v. Greenwood*, 4 B. & C. 281. But in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn; and in a great many cases relief has been and can be given to a party who has dealt with his property under the influence of a mistake. *Earl Beauchamp*

¹ Nova Scotia, 1885 Dec. 10, L. R. XI Appeal Cases 84.

² New Zealand, 1881 Feb. 22, L. R. VI Appeal Cases 181.

BY ERROR.

v. Winn, *Law Rep.* 6 H. L. 234; *Cooper v. Phibbs*, *Law Rep.* 2 H. L. 170; *McCarthy v. Decain*, 2 Russ & Mui, 614; *Livesey v. Livesey*, 3 Russ 287.

DEMAND OF

CAMPBELL V. THE COMMERCIAL BANKING COMPANY OF SYDNEY ¹

44. A demand of payment is not bad because it demands more than what is really due, and it does not do away with the necessity on the part of the debtor of tendering what is actually due, unless there is at the same time a declaration amounting to a refusal to take less. *The Norway*, 3 Moo. P. C. N. S. 245.

MOORE V. SKELLEY ²

45. By an agreement written in a mortgage deed, the mortgagor was to remain in possession of the property until demand should be made by the mortgagee of the money advanced, and then in default of payment, the mortgagee would enter in possession.

It was decided that, under such agreement, a reasonable time must be given to the mortgagor to make the payment, after the demand has been made. The mortgagee having entered in possession immediately, an action in damages for trespass was maintained.

SIR BARNES PEACOCK, p. 293 :—The deed must receive a reasonable construction, and it could not have meant that the plaintiff was bound to pay the money in the very next instant of time after the demand, but he must have a reasonable time to get it from some convenient place. For instance, he might require time to get it from his desk, or to go across the street or to his bankers for it. There are other circumstances in the case. When, as here, the person making the demand is not the person entitled to the money, but his attorney, the person on whom the demand is made must have a reasonable opportunity to inquire into the authority of the person making the demand. The attorney may send a bailiff to make the demand and authorize him to receive the money, but the mere demand by that bailiff, does not intimate to the plaintiff that payment to him will suffice, that fact, at least, ought to have been communicated to the plaintiff. And even if that fact had been communicated to the plaintiff, still, if he *bonâ fide* doubted the truth of the statement, he would have been entitled to some opportunity to inquire into its truth before the defendants would be entitled to seize his goods.

FRAUDULENT PREFERENCES. See *INSOLVENCY* : *iusdem verbis*.

¹ New South Wales, 1879 Feb. 15, XL Law Times N. S. 137.

² New South Wales, 1883 Feb. 13, L. R. VIII Appeal Cases 285.

IMPUTATION.

CAMPELL V. DENT¹

46. According to the law of Scotland, imputation in indefinite payments is made by the creditor as he thinks fit; and it must be construed, in every case, so as to follow his own advantage.

THE RIGHT HONORABLE DR. LUSHINGTON, p. 308:—If this be so, the next consideration is, the law of Scotland on the subject: and the law of Scotland, though as might naturally be expected, there was formerly some variation and has been some change in opinion, yet the law of Scotland Vol. ii p. 535 states, "Before closing this subject of partial payments, it may be proper to clear the doctrine of indefinite payments from certain doubts which attend it in the application of payment made by one who stands indebted to another in more than one obligation. The rules are: First, that the creditor must receive as appropriate to one of these debts a payment made by the debtor for the purpose of extinguishing that debt. Secondly, that the receipt given by the creditor for the money will fix appropriation. Thirdly, that where the payment is made indefinitely and no appropriation expressed in the receipt, the creditor has the right to ascribe it to which debt he may see fit and it will be construed accordingly that he has followed his own advantage. Then he states the principle on which the practice is founded with the exception (which do not apply to the present case, even supposing them exceptions.) And he states the authorities on which he relies. I do not think it necessary to state those authorities at any extent but it may be advisable to refer to one which is in Morrison's Dictionary p. 873. The decision took place in 1739, in the case of *Torbs v. Inness*. We have receded much from the civil law in the matter of indefinite payment. With us it has been understood to be applied to the debt worst secured and to the debt not bearing annual rent to which as the *durior sors* it was applied by the civil law. Nay we have not gone so far as instead of the rule of the civil law that *electio* is *res debitoris* we have gone into the direct contrary that *electio* is *creditoris*, and accordingly it was in this case found that the indefinite payments were to be imputed as the creditor thought fit. In Mr. Erskine's 3rd book title 9, sec. 2 there will be found the same doctrine laid down in very nearly the same words.

ATTORNEY GENERAL OF JAMAICA V. MANDERSON²

47. The respondent was surety for the Collector of taxes in Jamaica, for the year 1842. The Receiver-general of the Island having pressed the Collector to remit him the arrears of 1841, this latter sent him a sum in which was included £5,000 collected for 1842. On receiving the sum, the Receiver-general appropriated the whole of it in liquidation of the arrears for 1841. An action was taken by the crown

¹ British Guiana, 1838 Dec. 18, 11 Moore 292.

² Jamaica, 1848 Feb. 18, VI Moore 239.

IMPUTATION.

against the respondent as surety for the taxes of 1842. The defence was that the money collected for 1842 having been remitted by the Collector to the Receiver-general, the condition of the bond was fully complied with. The action of the crown was maintained.

If a party be indebted to another, in two or more accounts, he is entitled to appropriate any payment he may make to whichever account he pleases. If, however, he does not make any appropriation of the payment, then the creditor may appropriate it as he pleases.

KERSHAW v. KIRKPATRICK¹

48. The giving of a cheque by the debtor with the intention to appropriate this payment to a debt, and the receiving of a receipt therefor by the creditor's agent, acting within the scope of his authority, constitute by the law an imputation of payment, which could only be changed by the consent of all the interested parties.

SIR ROBERT P. COLLIER, p. 393:—The only observation their Lordships think it necessary to make upon these provisions in the Code (Code Civil art. 1158 and C. N. arts. 1160, 1161) is, that they seem to attach somewhat more importance, as indeed the Code Napoleon does, to the written evidence of an appropriation than is attached to it in this country, the object being, no doubt, as far as possible to avoid contradictions of parol evidence.

OF MORTGAGE DUE IN ANOTHER COUNTRY. See INTERNATIONAL LAW : *iusdem verbis*.

SUBROGATION. See SUBROGATION : *what constitutes*

TENDER.

THE OWNERS OF THE "NORWAY" v. ASHBURNER. THE "NORWAY"²

49. Where a creditor demands from his debtor the payment of a larger sum than the amount due, in a manner which shows an intention indicating that it would be useless to tender any smaller sum, for if tendered it would be refused, there is a constructive waiver of any tender.

VALUE OF CURRENCY. See INTERNATIONAL LAW : *iusdem verbis*.

WITH BILLS OF EXCHANGE. See BILLS OF EXCHANGE : *iusdem verbis*.

¹ Quebec, 1878 Jan. 25, L. R. Appeal Cases 345.

² Admiralty, 1865 June 28, III Moore N. S. 245.

PETITION OF RIGHT

DAMAGES FOR BREACH OF CONTRACT.

WINDSOR AND ANNAPOLIS RAILWAY COMPANY V. THE
QUEEN ET AL,¹

50. It is settled law that a petition of right will lie for damages resulting from a breach of contract by the crown. It is immaterial whether the breach is occasioned by the acts or by the omissions of the crown officials.

LORD WATSON, p. 613:—Their Lordships are of opinion that it must now be regarded as settled law that, whenever a valid contract has been made between the crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the crown. Sect. 8 of the Canadian Petition of Right Act (39 Vict. c. 27) contemplates that damages may be recoverable from the crown by means of such a petition; and the reasons assigned by Lord Blackburn for the decision of the Court of Queen's Bench in *Thomas v. The Queen* L. R. 10 Q. B. 31, appear to their Lordships necessarily to lead to the conclusion that damages arising from breach of contract are so recoverable. A suit of damages in respect of the violation of contract, is as much an action upon the contract as a suit for performance; it is the only available means of enforcing the contract in cases where, through the act or omission of one of the contracting parties, specific performance has become impossible.

In *Tobin v. The Queen* 16 C. B. (N. S.) 355, chief justice Erle, whilst affirming the doctrine that the Sovereign cannot be sued in a petition of right, for a wrong done by the executive, took care to explain that "claims founded on contracts, and grants made on behalf of the crown are within a class legally distinct from wrong."

It was argued for the respondent that in *Thomas v. The Queen*, L. R. 10 Q. B. 31, the claim of the suppliant was not for damages, but for a pecuniary consideration alleged to have been due in terms of the contract; and consequently that it was unnecessary for the court to decide anything as to the liability of the crown for unliquidated damages resulting from breach of contract. But Lord Blackburn, in that case, deals with the suppliant's petition as alleging certain breaches of promises made to the suppliant on behalf of the Queen; and his reasoning appears to this Board to be quite as applicable to a claim of unliquidated damages for breach of contract, as to a claim for the contract price. Lord Blackburn rests the judgment mainly upon the "*Bankers' case*," (14 How. St. Tr. 1) which was a suit for annuities granted by letters patent under the great seal; but his Lordship at the same time points out that, from the time of Lord Somers, there had been repeated expressions of opinion by eminent judges in favour of the view that a petition of right lay against the crown on a contract. It is unnecessary to cite these opinions, which are all collected in *Thomas v. The Queen*. (L. R. 10 Q. B. 31). Their Lordships may, however, refer to the accurate ex-

¹ S. C. Canada, 1886 June 25, L. R. XI Appeal Cases 607.

DAMAGE FOR BREACH OF CONTRACT.

position of the law given by the late Justice Cockburn, C. J., in *Feather v. The Queen* (6 B. & S. 293):—"We think it right to state that we see no reason for dissenting from the conclusion arrived at by the Common Pleas in *Tobin v. The Queen* (16 C. B. (N. S.) 210). We concur with that court in thinking that the only cases in which the petition of right is open to the subject are, where the land, or goods, or money of a subject have found their way into the possession of the crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money, or when a claim arises out of a contract, or for goods supplied to the crown or to the public service."

See CROWN, CROWN LANDS.

PILOT

DUTIES AND LIABILITIES OF *See* MERCHANT SHIPPING :
iusdem verbis.

RENEWAL OF LICENSE. *See* MERCHANT SHIPPING : *iusdem verbis.*

PIRACY

ANTERIOR ACTS OF PIRACY.

REG. V. McCLEVERTY. THE "TELEGRAFO" OR "RESTAURACION" ¹

51. According to the principles of maritime law, goods piratically taken cannot be assigned and transferred to a third party as against their legitimate owner.

52. However, that rule does not apply to a ship belonging formerly to a pirate, as the taint of piracy does not, in the absence of conviction or condemnation, continue, like a maritime lien, to travel with the ship through her transfers to various owners.

SIR ROBERT PHILLIMORE, p. 60:—Many authorities were cited for the purpose of establishing the position that the goods of pirates cannot be transferred by the pirates to a third party. That goods piratically taken cannot be transferred to a third party as against their legitimate owner is an undoubted proposition of public and of international law, but the further and different proposition, that the ship of the pirate which has not been taken from another person cannot be transferred to an innocent purchaser for value, is not supported by any of the authorities cited. The goods of pirates are forfeited to the crown in its office of Admiralty, but not until after conviction, and the ship of the pirate, but not until the condemnation; or, as it is correctly stated in *Bacon's Abr.*, tit. "*Piracy*," the goods of pirates not taken from others, belong, after attainder, to the Crown or its grantee; and those of which others have been despoiled will be forfeited in the same manner if the owners come not within a reasonable time to vindicate their property.

¹ Virgin Islands, 1871 Feb. 15, VIII Moore N. S. 43

PIRACY EX JURE GENTIUM.

THE ATTORNEY GENERAL FOR THE COLONY OF
HONG KONG V. KWOK-A-SING ¹

53. Piracy is nothing but robbery and the principles of law applicable to one may be applied to the other.

LORD JUSTICE MELLISH, p. 199 :—They (their Lordships) see no reason to doubt that the charge of Sir Charles Hedges, judge of the High Court of Admiralty, to the grand jury, as reported in the case of *Rea v. Dawson* ² and which was made in the presence and with the approval of Chief Justice Holt, and several other common law judges, contains a correct exposition of the law as to what constitutes piracy *jure gentium*. He then says, "Piracy is only a sea term for robbery, piracy being a robbery within the jurisdiction of the Admiralty....."

If the mariners of any ship shall violently dispossess the master and afterwards carry away the ship itself or any of the goods with a felonious intention in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy." Of course there can be no difference between mariners and passengers.

PLEDGE

AGENT PLEDGING GOODS OF HIS PRINCIPAL. See **PRINCIPAL AND AGENT**: *iusdem verbis*.

COLLATERAL SECURITY.

FLINT V. WALKER ³

54. Four persons having bought a general herd of cattle, two of them obtained from a firm their endorsements on promissory notes, and as collateral security wrote them the following letter: "In consequence of your complying with our request, to endorse our bills for the purchase of Mr. J's herd, we hereby make over the said herd to you, requesting you to give Mr. Darlot (one of the four persons above mentioned) instructions how to dispose of the herd, and remit you the proceeds, until by such remittances your endorsement is covered."

The herd was delivered to Mr. Darlot. The firm gave no instructions, and had nothing to do with the sale of the herd which was sold by Darlot who made away with the proceeds.

In a suit against the firm by the two persons who had pledged the herd as collateral security, to recover the value of the herd, the latter were held not responsible as they never had the possession of it, and the letter operated only as a pledge or collateral security.

¹ Hong Kong, 1873 June 19, L. R. V P. C. 179.

² 13 State Trials 454.

³ Calcutta, 1847 Dec. 9, V Moore 179.

CONSTRUCTIVE DELIVERY.YOUNG V. LAMBERT ¹

55. Goods imported from England were consigned to a commercial firm in Quebec, and stored in the Customs warehouse there, according to the customs regulations, for freight, duties, and storage. By a contract in writing they were subsequently pledged by this firm to another one of the same place for advances made to them, and a note of such transaction entered in the book of the chief officer of the Customs, specifying the conditions on which the loan was made, with a request to such officer to hold the goods subject to the orders of the latter partnership, they paying the duty and storage charges before removal.

A creditor of the first firm obtained a judgment against them and seized the goods in bonds, but the execution was opposed by the pledgee, who asked the court to release the goods from seizure on the ground, that by the above contract the property of the goods in question was conveyed to them to secure repayment of the advances made by them. The Superior court maintained the opposition. The judgment was reversed by the Court of Review and the last judgment was confirmed in appeal.

The Judicial Committee held, that the circumstances of the case and the dealings of the parties constituted a constructive delivery, and that the judgments dismissing the said opposition could not be supported. The judgment of the Court of Appeal was reversed and that of the Superior Court restored.

RESTORATION OFSENÉCAL V. PAUZÉ ²

56. Where debentures are pledged as security for money advanced, and the debtor tenders the amount of the debt, and the creditor is unable to restore it, having parted with it, and treated it as his own property, the tender cannot be regarded as insufficient, under article 1975 C. C., because the owner owes other debts which became due before the one for which the things were pledged, and the creditor must pay the value of the debentures at the time of the demand, and, unless the contrary is proved, the value to be paid is their nominal or par value.

LORD MACNAGHTEN, p. 639:—On behalf of the appellant it was argued that the judgment under appeal ought to be reversed and the action dismissed on two grounds.

¹ Quebec, 1870 January 25, VI Moore N. S. 406.

² Quebec, 1889 July 27, L. R. XIV Appeal Cases 637.

RESTORATION OF

In the first place, it was contended that the tender was insufficient, and that, consequently, the action could not be maintained.

In dealing with this point Dorion, C. J., observes that this defence was not pleaded, and that the Court of Review decided a question which was not in issue. In these observations their Lordships concur.

The learned counsel for the appellant relied upon Article 1975 of the Civil Code of Lower Canada, which provides in reference to a thing pledged as security for a specific debt, that "If another debt be contracted after the pledging of the thing, and become due before that for which the pledge was given, the creditor is not obliged to restore the thing until both debts are paid." In connection with this Article they pointed out that it was established in evidence, and not, in fact, disputed, that other debts had been contracted and did become due during the currency of the promissory notes, and they argued that it was incumbent on Pauzé to tender a sum sufficient to cover the amount of this indebtedness, as well as the principal and interest secured by the promissory notes. In this view their Lordships cannot agree. As the learned Chief Justice observes, Pauzé complied strictly with the terms of the contract of deposit by tendering the amount due in respect of the promissory notes. Senécal, no doubt, might have claimed to hold the debentures until both debts were paid if he had been prepared to restore the debentures. It appears, however, that he had either parted with them already or was fully resolved at the time to treat them as his own property; he had no intention of restoring them in any event. In these circumstances, though he alleged that other sums were due to him from Pangman's estate, he did not set up by way of defence the right which Article 1975 gives to the holder of a pledge. Obviously he could not have done so honestly.

PLEADING

See PRACTICE.

POLICY

See INSURANCE.

POSSESSION

See CHATTEL MORTGAGE, PRESCRIPTION : *eodem verbo*.

GRANTS OF CROWN LANDS.

DOE DEM. DEVINE V. WILSON ET AL.¹

57. A possession of thirty years of crown lands, under a grant made by the Lieutenant-Governor of New South Wales, in 1794 and 1799, though imperfectly described, is an unimpeached title.

58. Although it has been held² that if in the King's grant, there be no description by name, abutments, etc., the

¹ New South Wales, 1855 July 25, X Moore 502.

² Hungerford's case, 1 Leon. 30; Stockdale's case, 12 Co. Reg. 86; Brand v. Todd, Noy. 29.

GRANTS OF CROWN LANDS.

grant is void, but when a crown grant refers with certainty, though *in pais* only, that reference will be sufficient.

59. If by one construction a crown grant would be null, and by another it might be made good, the latter should be adopted.

60. If grants be very ancient, and the lands have been enjoyed according to the grant ever since the making of it, and rents have been paid for, in such case, the grant may be good, notwithstanding some legal defect in some of these particulars, as in absence of livery, for from possession, livery, will be presumed. See INJUNCTION: *iusdem verbis*.

INJUNCTION FOR TRESPASS. See INJUNCTION: *possession of crown lands*.

OF CROWN LANDS.

ATTORNEY GENERAL OF NEWFOUNDLAND V. CUDDILY ¹

61. A person in possession of crown lands under a license obtained for valuable consideration, may oppose the invasion of his right by the crown in the same manner as he could against any other person, and such a possession during more than sixty years is a bar to the claim of the crown. See ACQUIESCENCE: *undivided possession*.

POWER OF ATTORNEY

See ATTORNEY, PRINCIPAL AND AGENT.

PRACTICE

ACQUIESCENCE IN JUDGMENT. See ACQUIESCENCE: *iusdem verbis*.

ACQUIESCENCE IN PLEADINGS.

AUSTRALASIAN STEAM NAVIGATION CO. V. SMITH ²

62. Where at the trial both parties treated an issue as one which should be decided by the judge and not by the jury, and the appellants afterwards obtained a rule *nisi* for a new trial, on the ground that the judge had decided it wrongly, the court below exercised a right discretion in refusing to amend the rule *nisi* by stating that the judge should have left such issue to the jury.

ACTION FOR FREIGHT OR SALVAGE.

CLEARY V. McANDREW. THE CARGO EX "GALAN" ³

63. According to the rules of the Admiralty court, all ac-

¹ S. C. Newfoundland, 1836 June 17, 1 Moore 82.

² New South Wales, 1869 May 9, L. R. XIV Appeal Cases 318.

³ Admiralty, 1863 July 27, 11 Moore N. S. 235.

ACTION FOR FREIGHT OR SALVAGE.

tions for freight or salvage or other claims of the same nature must be taken by the master, though his claims may have been satisfied by the underwriters, generally, in such cases, the only parties really interested. But the master may be considered as suing as agent and trustee for his insurer; and the same rule seems to prevail at common law, according to the doctrine laid down in *Robertson v. Hamilton*¹.

AMENDMENT OF PROCEEDINGS.

RAINY v. BRAVO²

64. Where there is a variance between the declaration and the evidence, the proper time to apply to amend the declaration is at the conclusion of the plaintiff's case.

AMENDMENT OF JUDGMENT.

THE MONTREAL ASSURANCE COMPANY v. MCGILLIVRAY³

65. An Order in Council founded upon the report of the Judicial Committee on an appeal from the court of Queen's Bench, in *Lower Canada*, simply directed the reversal of the judgment. Upon the order being transmitted to Canada, the court of Queen's Bench recorded it, but was of opinion that it was unable to act further, on the ground, that as a court of appeal, it had no jurisdiction to make, of its own accord, such an order on the court below, as would give effect to the judgment of Judicial Committee.

Upon petition by the appellants, the Judicial Committee varied their judgment by adding to the reversal of the judgment of the court of Queen's Bench, a further direction, that the judgment of the Superior court, be also reversed, and the verdict given vacated, and that the cause be remitted back to the Superior court, with directions to that court to issue a *venire facias de novo*. See JUDICIAL COMMITTEE: *power of rectifying error in judgments*.

APPEARANCE.

HARVEY v. OWNERS OF THE SCREW STEAMSHIP "EUXINE"⁴

66. According to the rules of Practice of the court of Admiralty, proctors are not required to produce a proxy until called upon to do it.

DR. LUSHINGTON, in the case of *The Wilhelmine*, 1 W. Rob. Ad. Rep. 337, cited by their Lordships: — Now, looking to the ancient

¹ 4 East, 522.

² Sierra Leone, 1872 June 11, IX Moore N. S. 36.

³ Lower Canada, 1861 Feb. 8, XIII Moore 125.

⁴ V. A. Malta, 1871 Nov. 16, L. R. IV P. C. 68.

APPEARANCE.

practice of the court, it is perfectly clear that the rules, with regard to appearances in the Court of admiralty were originally the same as are now adopted in the ecclesiastical courts. In the more modern practice of this court these rules, it is true, have been relaxed for the convenience of the practitioners, and for a period of probably not less than two hundred years, proctors have been permitted to appear on behalf of parties suing without being called upon to exhibit any proxy, as is the indispensable custom in the ecclesiastical courts. The first question, then, which I must consider in the present instance is this: what is the duty and what is the responsibility attached upon a proctor who so appears without exhibiting a proxy? Upon general principle, I apprehend that the court is entitled to expect from such proctor when he does appear that he be duly authorized by some person having an interest in the cause in issue, or that he should have a justifiable and strong ground for believing that the individual for whom he appears has such an interest. I apprehend further, that at any period of the cause and at any time before the case is dismissed out of the Court, the Court has a right to call upon that proctor to state not generally but specially by name the whole of the parties for whom he is authorized to appear. The authority of the court to make the demand upon the proctor I conceive inherent in the jurisdiction of this Court in common with all other Courts and is absolutely essential to the due administration of justice for the purpose of preventing unauthorized litigation. If it were otherwise what would be the consequence in regard to the proceedings in this Court. The consequence would be that proctors might appear for individuals who either were not in existence or for persons who gave no authority or who assuming the names of others might take the chance of a decree being made in their favour without at any time being obnoxious to the consequences of an unsuccessful litigation.

AUDI ALTERAM PARTEM.WILLIS V. SIR G. GIPPS ¹

67. The governor and council of a colony having removed a judge, without giving him notice, or affording him an opportunity of answering the charges brought against him, upon which the order of amotion was founded, such order was held illegal and reversed.

CASE REFERRED TO EXPERTS.MULLICK V. MULLICK ²

68. The Privy Council referred this case to the Master to inquire whether there was any religious building amongst the Hindoos less expensive than a temple. The report of the Master having been found by their Lordships not to agree with the intention of the testator, it was referred

¹ New South Wales, 1846 July 8. V Moore 379.

² Calcutta, 1829 June 23, I Knapp 245.

CASE REFERRED TO EXPERTS.

back to the Master with directions to reduce the allowance for this object to what is usual and proper in such a case as the present in that country.

HUTCHINSON V. GILLESPIE ¹

69. The Judicial Committee having, in 1888, referred this cause to an expert to settle the question of fact, and that expert having reported according to the interlocutory Order appointing him, their Lordships refused to issue a commission to examine witnesses to prove facts declared not pertinent by the expert

BUGÉJA V. CAMILLERI ²

70. It was held in this cause, that it is not competent for the parties in a suit, where there have been experts appointed, who have reported, to propose, at the hearing of the appeal, a fresh reference to experts for the purpose of suggesting another scheme than the one proposed in a suit for the division of the property in litigation.

CASE REMITTED TO COURT BELOW.

FRIXIONE V. TAGLIAFERRO ³

71. An action of damages for breach of contract was dismissed by the courts below. The Judicial Committee reversed the judgment. To ascertain the amount of damages suffered, the Judicial Committee referred the cause to the court below with instruction to determine the amount of damages suffered by the plaintiff, and to condemn the respondent to pay it together with interest thereon from the time when judgment would be entered in the court below.

LE FEUVRE V. SULLIVAN ⁴

72. A policy of insurance on life was transferred by the insured to a creditor, as collateral security for money advanced, and the company was not notified of this transfer. The same policy was also transferred by the insured to his wife who served the transfer upon the company. Upon the death of the insured both assignees claimed the amount of the policy.

In the absence of evidence, whether the assignment to the wife was *bona fide*, and for a valuable consideration and without notice of the first transfer, the Judicial Committee

¹ Lower Canada, 1844 May 9, IV Moore 378.

² Malta, 1870 July 5, VII Moore 35.

³ Malta, 1850 Feb. 13, X Moore 175.

⁴ Jersey, 1855 July 17, X Moore 1.

CASE REMITTED TO COURT BELOW.

reversed the finding of the Royal Court of Jersey in her favour, and remitted the case back to that court for further proof upon these points, with a declaration, that if the evidence established the title of the wife of the insured then that she had a preferential title, but, if otherwise, her title was to be considered as subsequent to that of the creditor on the policy for the principal and interest of his debt. *See EVIDENCE: new evidence, INSOLVENCY.*

WALLACE V. MCSWEENEY ¹

73. When the pleas are inconsistent, multifarious and embarrassing, they ought not to be set aside, but according to the rules of practice, the court should order these pleas to be amended, or in default, to be set aside. The case was remitted back to the court below for the purpose of getting the pleas amended, and in default to be set aside.

DYSON V. GODFRAY ²

74. The appellant had opposed to the respondent's action a plea of compensation. The court below took no notice of this plea and gave judgment for plaintiff.

Their Lordships ordered the record to be remitted to the court below with instructions to ascertain whether the claim offered in compensation was a liquidated demand in the sense of the law, and to admit or reject this plea accordingly.

CERTIFICATE OF THE COURT BELOW.**LEQUESNE V. NICOLLE ³**

75. When the Privy Council makes a reference to a court below to certify as to a point of their practice, their certificate cannot be disputed, unless a petition praying for a fresh reference be presented, and supported by affidavits impeaching the accuracy of the certificate.

CONCLUSIONS.**BOSWELL V. KILBORN ⁴**

76. Although the judges in Lower Canada, under the old French law, have power to reject or modify the conclusions in the pleadings, provided they do not grant *ultra petita*, yet even if the court is enabled to change the remedy sought by the action and administer relief entirely different from that which the action prays for, such power cannot be exercised in such a manner as to change completely the

¹ Nova Scotia, 1868 July 3, V Moore N. S. 244.

² Jersey, 1884 June 13, L. R. IX Appeal Cases 726.

³ Jersey, 1830 July 10, 1 Knapp 257.

⁴ Lower Canada, 1862 Feb. 7, XV Moore 309.

CONCLUSIONS.

nature of the action, where a plaintiff, having a choice between two remedies, has exercised his election by the form in which the action is brought, as, when a party who instead of demanding the performance of a contract, takes an action of damages for breach of contract, the judge cannot order the performance of the contract.

LORD CHELMSFORD, p. 326:—The plaintiffs demand damages for breach of the contract on the refusal of the Defendant to accept the hops tendered to him. The Court has converted the proceeding into a suit to enforce the performance of the contract, which they order or intend to order by their judgment to be carried out. This the respondents contend they had a right to do, and they referred to a passage in 4 Guyot's *Répertoire*, *verb. Conclusions*, p. 351, which the Court was said to have acted upon in a former case, that "*le juge peut rejeter, accorder ou modifier les conclusions prises par les parties.*" Whether the power thus described can be pushed to the extent of enabling the Court to change the nature of the action, and to administer relief entirely different from that which is sought by the plaintiffs may be extremely questionable. But if such a power exists, it can hardly be exercised with propriety in a case where a party has the choice between two remedies. Assuming that the plaintiffs might have instituted a suit to enforce the performance of the contract, it cannot be doubted that they were at liberty to waive this form of proceeding, and to bring their action to recover damages for breach of contract. And when they have deliberately preferred the latter remedy, it ought not to be in the power of the Court to force upon them the other, to which they made no claim. Their action is in form and in substance a demand for damages merely for the breach of the contract in not accepting the hops.

In such an action it was not disputed that the plaintiffs could not recover the price of the hops, but only the difference between the contract price and the market price at the time of the breach of the agreement.

BROWN V. LES CURÉ ET MARGUILLIERS DE L'ŒUVRE ET
FABRIQUE DE NOTRE-DAME DE MONTRÉAL ¹

77. A plaintiff may generally obtain a judgment for less than that for which he asks, and for relief in a different manner and form than that for which he has prayed, provided it is within the scope of the prayer. *See the remarks of their Lordships, MANDAMUS: form of the Writ.*

CONFESSION OF JUDGMENT.

THE COLONIAL BANK V. CAZABON ²

78. According to the practice in Trinidad as regards cognovits, a confession of judgment was signed by the

¹ Quebec, 1874 Nov. 21, L. R. VI P. C. 157.

² Trinidad, 1851 June 21, VII 412.

CONFESSION OF JUDGMENT.

defendant himself, in the presence of his solicitor. The Supreme court refused judgment on this confession, because it was not signed by the defendant in the presence of the *Escribano* of the court, as required by the Spanish law in force in the Island.

The Judicial Committee held that the plaintiff having followed the uniform practice of the court since the Ordinance of 1845 was entitled to judgment.

CROSS-ACTIONS.**AUSTRALASIAN STEAM NAVIGATION COMPANY V. SMITH ¹**

79. Where cross-actions involving the same questions of law and fact are separately tried, with the result that contradictory verdicts are obtained, if the evidence at each trial is so fairly balanced that a jury might reasonably find either way, both cases ought to be tried again, not separately, but together. The court in such a case can neither be called upon to exercise the functions of a jury nor to issue contradictory decrees.

In this case, their Lordships set aside one of the verdicts as against the weight of evidence.

COSTS. See COSTS.

DECLARATION SUBSTANTIATED IS SUFFICIENT.**THE QUEBEC FIRE ASSURANCE COMPANY V. ST. LOUIS ET AL. ²**

80. The appellants paid to the *Fabrique* of a parish the amount of their insurance, after the church had been destroyed by fire, by the pretended negligence of the respondent. On the day of the payment they obtained, by notarial deed, a subrogation into the rights of the said *Fabrique*, and thereupon brought an action against St. Louis. The action set forth the principal facts and the deed, which appeared to be an assignment of the *Fabrique's* right against St. Louis to the company, and alleged that through the gross negligence of the defendant and their servants damages had been caused to the plaintiffs. The defendant objected that the declaration as framed imported a demand, in the right of the plaintiffs, as assurers, in which character they had no right of action.

The Judicial Committee held that though the declaration was not drawn in a very correct form, yet it was substantially good. It discloses a derivative title in the plaintiffs

¹ New South Wales, 1889 March 21, L. R. XIV Appeal Cases 321.

² Lower Canada, 1851 Feb. 6, VII Moore 286.

DECLARATION SUBSTANTIATED IS SUFFICIENT.

under the *Fabrique*, and claims against the defendants a definite portion of the damages, which the *Fabrique* was entitled to against them. The plaintiffs did not sue in their own right as assurers, and the allegation that they have sustained damages by reason of the neglect of the defendants is surplusage, and totally immaterial, but as being subrogated to the debt due to the *Fabrique* by the defendants for the damages occasioned by them.

DELAY.SILLERY V. HARMANIS ¹

81. An action to set aside a sale under execution, in Ceylon, must be brought within thirty days from the sale. The absence of the judgment debtor is no excuse.

ESSENTIAL PAPERS OMITTED IN THE TRANSCRIPT.MASON V. THE ATTORNEY GENERAL OF JAMAICA ²

82. Where papers essential for the decision of the cause do not form part of the transcript, the hearing of the appeal will be postponed, and an order made to the court below for the transmission of such papers.

MC CARTHY V. JUDAH ³

83. The courts in Lower Canada examined witnesses to prove the genuineness of a signature which was denied, and compared the handwriting of the instrument sued upon, with the handwriting of two other documents put in evidence and admitted to be genuine. In such circumstances, the Judicial Committee, upon petition for that purpose, ordered the court in Lower Canada to transmit the originals for the purpose of inspection and comparison at the hearing of the appeal from the judgment of the court in Lower Canada.

EFFECT OF JUDGMENT.GAVIN V. HADDEN ⁴

84. The legality or quality of a judgment in respect of irregularity or questions of fact cannot be attacked by another judgment, except when fraud is specially alleged and proved.

SIR JOSEPH NAPIER, p. 117:—It is not the province of a fresh suit to show irregularity or error of fact or of law in another suit, other-

¹ Ceylon, 1882 Nov. 28, L. R. VIII Appeal Cases 99.

² Jamaica, 1843 Nov. 29, IV Moore 228.

³ Lower Canada, 1858 June 21, XII Moore 47.

⁴ Ceylon, 1870 July 10, VIII Moore N. S. 90.

EFFECT OF JUDGMENT.

wise there would be no end of litigation, and the humblest court in the kingdom might be called on to set aside the decision of the highest.

Irregularity, error of fact or of law, must be shown in the suit itself, must be certified by application to the original court or by way of appeal from or review of the judgment. In this case the fresh suit is not by the original defendant, but by a co-executor and co-deviser. That makes no difference. It would cause most incalculable mischief if it were once supposed, that an action and judgment against an executor, or other legal representative, as such is not as binding against the testator's estate as any action or judgment against any defendant is binding against him.

The only ground on which it is competent for any other executor, or any person interested in the estate to question in a new suit the proceedings in a former action which has resulted in a judgment against the property of the testator, is fraud.

Fraud will suffice to open anything. If a creditor of a person who happens to be executor, dishonestly obtains judgment and execution against the assets, when his claim was only against the executor personally, such a transaction can be unravelled.

PITTS V. LA FONTAINE ¹

85. When a decision of the Judicial Committee has been reported to Her Majesty and has been sanctioned, it becomes the decree or order of the final court of appeal; and it is the duty of every subordinate tribunal to which the order is addressed, to carry it into execution.

FINAL JUDGMENT.**BELSON V. BELSON ²**

86. An order or judgment which cannot be modified or affected by the final judgment is not an interlocutory judgment, but a final one. Thus a judgment directing the infant children of the parties, to be left provisionally in the custody of the mother, pending a suit for a separation, is a definitive sentence *quoad* the custody of the children, as the ultimate decision in the suit cannot affect that custody.

ENROLMENT OF JUDGMENTS.**HYSLOP V. JONES ³**

87. According to the well established practice of the court of Chancery, in the island of Jamaica, a judgment may be properly enrolled by one of the defendants, five months after its date.

¹ C. C, Constantinople, 1880 Nov. 20, L. R. VI Appeal Cases 482.

² Jersey, 1850 Feb. 22, VII Moore 30.

³ Jamaica, 1839 May 9, III Moore 15.

INTERVENTION.ORPHAN BOARD V. REENAN ¹

88. The principle of the law of intervention is, that if any third person considers that his interests will be affected by a cause which is pending, he is not bound to leave the care of his interests to either of the litigants, but has a right to intervene, or be made a party to the cause, and take on himself the defence of his own rights, provided he does not disturb the order of the proceedings.

89. The intervener may come in at any stage of the cause, and even after judgment, if an appeal can be allowed.

CARTER V. MOLSON *et vice versa* ²

90. Where a judgment creditor seized the revenues of a substituted property, a subsequent institute, *grevé*, or the substitute, *appelé*, has no right, under article 154 of the Code of civil procedure, to intervene, as the proceedings, *res judicata* between the seizing creditor and the first institute, *grevé*, in possession could have no effect against them.

LORD WATSON, p. 674:—Then as to the appeals presented by the intervening petitioners. Both of these depend upon precisely the same considerations and may be disposed of as if they were one appeal. The petitioners have not, and do not assert that they have, any direct or legal interest, either in the rents of the St. James street property, or in the dividends on the 148 bank shares, which accrue and become payable to Alexander Molson during his lifetime. On the other hand, it is not disputed that they have material interests, entitling them to resist any attachment of the *corpus* of the property or of the shares, at the instance of a creditor of Alexander Molson, which might have the effect of defeating their right as substitutes, in the event of Alexander Molson's death. They do not, however, allege that the writ of *saisie-arrest* will attach either the *corpus* of the 148 bank shares, or the dividends accruing upon them, after the death of Alexander Molson. All that they do allege is, that these shares as part of the residue of his estate are subject to the substitution in their favour contained in John Molson's will, and that the dividends payable to the institute are, in terms of that will, not arrestable. The only interest in respect of which their right to intervene in the present litigation is maintained, is the apprehension that some points may be incidentally decided, between the arresting creditor and Alexander Molson, which may prejudice their rights at some future time. It is not said that any judgment in this suit can possibly enable the creditor to attach the estates which they may eventually take, assuming the substitutions in their favour to be valid; nor is it suggested that anything decided in this suit between the judgment debtor and creditor, with regard to the validity of these substitutions would be binding upon them as *res judicata*.

¹ England, 1829 July 17, 1 Knapp 91.

² Quebec, 1885 July 4, L. R. X Appeal Cases 664.

INTERVENTION.

What they do plead is that such a decision might afford an objectionable precedent, if and when they require to assert their rights judicially, and consequently, that they have the right to intervene. That plea appears to their Lordships to be untenable. Sect. 154 of the Procedure Code, which regulate this matter, gives the right of intervention to the parties who are "interested in the event of a pending suit." The event of the suit can only refer to the operative decree which may ultimately be given in favor of one or other of the parties to it, and not to the views of fact or law which may influence the court in giving the decree. To admit the appellant's plea would involve the admission of a right to intervene on the part of every person who had an interest in preventing a decision being given *inter alios*, which might be cited as an authority against him in some other suit. Section 154 appears to have been framed for the very purpose of limiting the right of intervention to those persons who can show that a final judgment may possibly be obtained in the suit, which will enable the party who obtains it to possess himself of their estate, or otherwise to impair their legal rights.

Their Lordships are accordingly of opinion that the judgments appealed from ought to be affirmed, and they will humbly advise Her Majesty to that effect. There will be no order as to the costs of any of these appeals.

LIS PENDENS.**KING V. PINSONNEAULT¹**

91. When a suit has been settled by a "*transaction*," although a discontinuance of the action has not been fyled of record, a new action can be instituted to enforce the transaction; and a plea to the effect that the second action was not maintainable as long as the first was pending, is not a good plea; it is sufficient that the plaintiff offers to discontinue the action as soon as the other party has fulfilled the conditions of the transaction.

MIS-DIRECTION OF THE JUDGE.**THE GREAT WESTERN RAILWAY CO. V. BRAID & FAWCETT²**

92. The action was to recover damages against a railway company for injuries received, by reason of want of skill in the construction and negligence in the repairing and maintaining of the railway. The defence of the company was that the accident was caused by a storm of such an extraordinary nature, that no experience could have anticipated its occurrence. Under such issue the facts, as affecting the question of negligence in the construction and maintenance

¹ Quebec, 1875 March 2, L. R. VI P. C. 245.

² Upper Canada, 1863 Feb. 7, 1 Moore N. S. 101.

MIS-DIRECTION OF THE JUDGE.

of the railway, ought to have been left by the judge distinctly and pointedly to the jury.

But the Judicial Committee, being, notwithstanding the omission of such direction, satisfied with the verdict which given otherwise would have been wrong, refused to grant a new trial, adopting the rule of the Court of Exchequer, laid down in *Ford v. Lavey*, 30 N. L. J. N. S. Exch. 352, that non direction is only a ground for granting a new trial, where the verdict is against the weight of evidence.

STAGE V. GRIFFITH ¹

93. An assistant master of the government school, at St. Helena, took an action of damages against the commanding officer for a libel contained in a letter written by the defendant to the colonial secretary of the island, stating that the plaintiff was drunk and disorderly at a certain time and place. At the trial, the letter was neither proved nor given in evidence. The judge told the jury that they had to find, whether it was a privileged communication or not, and directed them to decide whether or not, the defendant had taken sufficient care to ascertain the truth of the statement made. The jury found for the plaintiff with damages and the judge concurred.

Held, that the proceedings were altogether irregular and judgment was arrested, the judge having mistaken the functions of the jury, first, in leaving it to them to determine whether the alleged libel was contained in an official document and whether it was a privileged communication; and, secondly, in not leaving it to them to say, whether the letter, if published, was *bonâ fide*. If so found, then it was for him to determine whether, under all the circumstances, it was a privileged communication or not.

LAMBKIN V. SOUTH EASTERN RY CO. ²

94. In an action of damages against a railway company for injury done by the negligence of their servants, there is no misdirection on the part of the judge in having left it to the jury whether all was done which was reasonably and practically possible under the circumstances of the case; and inasmuch as the damages were not of such an excessive character as to shew that the jury had been either influenced by improper motives or led into error, there ought not to be a new trial.

NEW EVIDENCE. See EVIDENCE: *iusdem verbis*.

¹ St. Helena, 1869 Feb. 8, VI Moore N. S. 18.

² Quebec, 1880 Feb. 3, L. R. V Appeal Cases, 352.

NOTES OF THE JUDGE IN A JURY TRIAL.POWNALL V. MASCOLL ¹

95. Where in a jury trial, a writ of error has been taken, and an affidavit is filed stating that one of the allegations in the exceptions to the direction of the judge is incorrect, and where the judge being called upon, by the court of Appeal, admitted the statements of the affidavit, declaring that he had sealed the bill under an erroneous impression, the Privy Council held that the judgment of the court of Appeal should not have simply ordered that the bill should be taken off the file, but that the bill ought to have been taken off for the purpose of having it amended by the judge's notes.

NON-SUIT IN JURY TRIAL.HITCHINS V. TOLLINGSWORTH ²

96. Error will lie on a non-suit. *Newell v. Pidgeon*, 1 Str. 235.

97. A bill of exceptions would not lie in a case where, upon the trial, the judge directed a non-suit, the plaintiff not appearing when called. *Corsar v. Reed*, 21 Law Journal Q. B. 18.

98. Non-suit will not lie upon a wrong venue, if the question is not raised in the pleadings.

GIBLIN V. McMULLEN ³

99. The Judicial Committee held that, in a trial by jury, it is the duty of the court, when at the close of the plaintiff's case there is no evidence upon which the jury could reasonably and properly find a verdict, to direct a non-suit, and that in every case, before evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally any evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

NOTICE OF ACTION. See CORPORATION: *iusdem verbis*.

NUMBER OF COUNSEL TO BE HEARD.*In re* DOWNIE AND ARREINDELL ⁴

100. The rule is to hear two counsel on each side. But when there are several parties in a suit having each dif-

¹ Antigua, 1833 Nov. 29, III Knapp 161.

² Jamaica, 1852 June 16, VII Moore 228.

³ Victoria, 1868 Dec. 3, V Moore N. S. 435.

⁴ British Guiana, 1841 June 21, III Moore 419.

NUMBER OF COUNSEL TO BE HEARD.

ferent interests, the rule is to be construed so that each party is entitled to have two counsel heard on his behalf.

LORD BROUGHAM, p. 419:—Observing, that if there are several parties in one appeal who say they are in different interests, then if it is quite clear to the court that they really are in different interests, the practice is to hear them by separate Counsel. But that if they are in the same interest, then the court makes them arrange together so as to be heard by one counsel. But that there being in this case two appeals, each Appellant had a right to be represented by two counsel, and their Lordships could not limit them to one though the facts and arguments used might be the same in both cases.

OBJECTIONS NOT RAISED IN THE COURT BELOW.**FRANKLAND V. MCGUSTY ¹**

101. From the remarks of Sir John Leach, Master of the Rolls, it appeared that objections cannot be made to a judgment, at the hearing before the Privy Council, which have not been made in the court below.

SUMBOO ET AL. V. NARAINI ET AL. ²

102. The Judicial Committee must take notice of the law of the country from which the appeal comes, and decide according to it; although it has been overlooked by the court below.

DONEGANI V. DONEGANI ³

103. The Judicial Committee will not notice any alteration of rights that may have taken place between the parties in consequence of an Act of the provincial legislature, but which does not appear on the record.

ORPHAN BOARD V. REENAN ⁴

104. An appellant cannot object before the Privy Council to the hearing of an appeal by arguing that the judgment against which he appeals is void for want of parties to the suit; that objection not having been made in the court below. Having appealed against the judgment and treated it as effective, he will not be permitted to raise such objection, for the first time, before the Committee.

¹ Demerara, 1839 July 10, 1 Knapp 274.

² Bengal, 1835 Feb. 6, III Knapp 55.

³ Lower Canada, 1835 Feb. 2, III Knapp 63.

⁴ England, 1829 July 17, 1 Knapp 83.

OBJECTIONS NOT RAISED IN THE COURT BELOW.**THE BOARD OF ORPHANS V. KRAEGELIN ¹**

105. The Judicial Committee will not entertain technical objections not taken in the court below, when they are merely of form, and do not affect the substance of the matter in controversy.

BOWES V. THE CITY OF TORONTO ²

106. An objection that all the parties who are interested in the action, and should have been called in, are not in the suit ought to have been made in the court of first instance. A court of appeal will not treat the suit as defective on that ground when the objection was not taken in the court below.

DEVINE V. HALLOWAY ³

107. An objection not raised in the court below cannot be taken in the appellate court, unless it is patent upon the face of the proceedings, so that the appellate court can take judicial notice of the objection.

MACKAY V. COMMERCIAL BANK OF NEW BRUNSWICK ⁴

108. The Judicial Committee will not decide a case or send it for re-trial upon points which appear to have been raised for the first time at their bar, and which possibly may have been treated as agreed upon or too clear for argument by the court below.

GARDEN GULLY UNITED QUARTZ MINING COMPANY V. MCLISTER ⁵

109. When a new defence is raised in the argument before the Judicial Committee, although their Lordships may be satisfied that it is a good answer to the action, they will not reverse a judgment upon such grounds as it would be a great injustice to the respondent.

SIR BARNES PEACOCK, p. 57:—Their Lordships are not disposed to hold parties too strictly to their pleadings in the lower court; but they consider that it would be an act of great injustice to allow defences to be set up in appeal which have not been suggested or alluded to in the pleadings, or called to the attention of the court below. They do not, therefore, wish to be understood that by hearing the learned counsel for the appellant, and by expressing an opinion upon points which were not raised in the court below, they would have felt themselves justified in reversing the decision of the court

¹ British Guiana, 1855 June 16, IX Moore 438.

² Upper Canada, 1858 Feb. 15, XI Moore 463.

³ New South Wales, 1861 Feb. 7, XIV Moore 290.

⁴ New Brunswick, 1874 March 14, L. R. V P. C. 394.

⁵ Victoria, 1875 Nov. 9, L. R. 1 Appeal Cases 39.

OBJECTIONS NOT RAISED IN THE COURT BELOW.

below, if they had considered that the points thus raised constituted a defence to the plaintiff's claims.

CORPORATION OF ADELAIDE V. WHITE ¹

110. It was argued by the appellants that the judge below should have directed the jury that the action was not maintainable, because it was not brought within three months from the trespass complained of, and because notice of action had not been given.

Their Lordships refused to hear any argument on those two points, the same not having been raised in the court below. The appeal was dismissed.

OBJECTIONS TO THE RIGHT OF APPEAL.**ALDRIDGE V. CATO ²**

111. It is too late for the respondent at the hearing to take an objection to the competency of the appeal, on the ground that the subject matter of the suit did not involve the prescribed appealable value; such objection not having been taken in the respondent's case. The proper course would have been for the respondent to move, in the first instance, to dismiss the appeal on that ground.

SAUVAGEAU V. GAUTHIER ³

112. Where leave to appeal has been unduly given, the proper course is to come before the Judicial Committee before any expense has been incurred, and to apply for the dismissal of the appeal. Such an application if delayed till the hearing will only be granted without costs.

If there be special circumstances in favor of granting special leave to appeal, an application for such leave will be entertained, but, if it is granted, fresh security for costs must be given.

MUSSORIE BANK V. RAYNOR ⁴

113. The same principles set forth in the above two cases were maintained in this appeal.

SIR ARTHUR HOBHOUSE, p. 328:—As a general rule, the proper course, in a case like the present, is for the respondent to move as early as possible to rescind the Order in Council; and their Lordships think it right to call attention to the opinion expressed in the second volume of the *Law Reports, Indian Appeals*, p. 82. It is said thus: "In their Lordships' opinion an objection of this kind ought

¹ South Australia, 1886 March 4, LV Law Times N. S. 3.

² Natal, 1872 June 28, IX Moore N. S. 71.

³ Quebec, 1874 May 5, L. R. V P. C. 494.

⁴ 1882 March 21, L. R. VII Appeal Cases 328.

OBJECTIONS TO THE RIGHT OF APPEAL.

to be taken by the respondents as early as the matter is brought to their notice, for the plain reason, that if the leave to appeal is on that ground rescinded, no further costs are incurred; and it is wrong to leave the objection until the hearing of the appeal, when the record has been sent from India, and when all the costs attending the hearing have been incurred."

See APPEAL: special applications.

ORDER TO STAY PROCEEDINGS.

NAURAB SIDHEE MUZUR ALLY KHAN V. RAJAH OAJOODHYARAM KHAN¹

114. The Judicial Committee will only order a stay of proceedings in the court below, in a pending appeal from an interlocutory order, when, *first*, a serious injury will be the result to the party applying if the order was not given; *secondly*, when the application is made promptly at the first stage of the proceeding.

See APPEAL: special applications.

PARTIES IN CONTEMPT.

CURTIS V. CURTIS²

115. The female defendant in a suit for divorce on the ground of adultery being absent and in contempt of court, her attorney tendered a defensive allegation, but the court rejected the allegation and refused her the right to plead so long as she resisted the orders of the court.

LORD BROUGHAM, p. 256:—It is a general rule of all courts, that no party shall be allowed to take active proceedings, if in contempt. It appears to us, not merely the right of the party to object to the admission of this defensive allegation, but it is the right of the court. The court has a right to say that it will not allow a process issuing out of the court to be treated with contempt.

PLEADINGS.

Moore v. Moore³

116. Held, that a husband has the right to plead, in a responsive allegation, the adultery of his wife as a bar to an action for conjugal rights, unless the husband has condoned or been a party to the concealment of acts of adultery.

MURPHY ET AL. V. GLASS⁴

117. The rule that pleadings are to be constructed most strongly against the party pleading is subject, both at law

¹ Bengal, 1865 Nov. 28, L. R. I. P. C. 8.

² Canterbury, 1845 June 14, V Moore 252.

³ Canterbury, 1840 Feb. 6, III Moore 84.

⁴ Victoria, 1869 Feb. 19, XX Law Times N. S. 461.

PLEADINGS.

and in equity, to an exception as to the pleading of matters which are peculiarly within the knowledge of the opposite party.

GIOVANNI DAPUETO V. JAMES WILLIE & CO. THE "PIEVE
SUPERIORE" ¹

118. A petition or protest filed against the jurisdiction of the Admiralty court should contain the facts which shew want of jurisdiction.

NATIONAL BANK OF AUSTRALASIA V. UNITED HAND-IN-HAND
AND BAND OF HOPE COMPANY ²

119. The action was to set aside certain mortgages given by the directors of the respondent to the appellants, and also certain deeds of sale of the lands so mortgaged, which the bank, assuming to act in the exercise of the powers of sale in their securities, had given to various purchasers, as fraudulent and void, and also because the appellant had been paid their hypothec in full. The appellants denied the fraud, and alleged that they had become owners of the properties mortgaged by proper and legal titles set forth in the defence.

Held, that the issues raised were not merely mortgage or no mortgage, but, whether, by means of their acts, subsequent to the impeached mortgage, the appellants had ceased to be mortgagees, and had become absolute owners.

Held also, that the action should not have been dismissed because the bill did not contain a prayer for redemption, and that the court was bound to try all the issues. *Montgomery v. Calland*, 14 Sim. 79; *The Incorporated Society v. Richards*, 1 D. & War. 158.

BARCLAY V. BANK OF NEW SOUTH WALES ³

120. The action was for breach of contract and damages. Without denying or admitting the allegations of the declaration, the defendant pleaded as a defence to the action an agreement alleged to have been made between the parties in settlement of the difficulties between them, but the plea did not specially aver that this arrangement was made in satisfaction and accord of the causes of action set forth in the declaration.

The Judicial Committee held, that the plea was bad and

¹ Admiralty, 1874 March 21, L. R. V. P. O. 482.

² Victoria, 1879 June 14, L. R. IV Appeal Cases 391.

³ New South Wales, 1880 Feb. 12, L. R. V Appeal Cases 374.

PLEADINGS.

maintained a demurrer to the plea, on the ground that it did not in terms state that the agreement set out in the plea was accepted by the parties in accord and satisfaction of the causes of action in the declaration mentioned.

POWER TO RECTIFY ERRORS IN JUDGMENT. See JUDICIAL COMMITTEE: *iusdem verbis*.

PRINTED CASE.

JACKSON V. PROTERO ¹

121. There is no rule requiring the respondent to print his case, before applying to dismiss, when the appeal is not prosecuted by the appellant.

STANFORD V. BRUNETTE ²

122. The Judicial Committee can only look to the record of proceedings transmitted by the court below. It will not receive short hand-writers' notes to impeach the accuracy of the judges' notes, taken at the trial, to show that the evidence set forth in the transcript record was not exhibited, or that evidence had been given which had been omitted in the transcript, and a petition to that effect was dismissed.

PROPERTY SEQUESTERED.

MUSADEE MAHOMED CAZUM SHERAZEE V. MEEZA ALLY
MAHOMED KHAN ³

123. According to the rules of a court of equity, no proceedings could be taken against a sequestrator except by leave of the court.

If a person has a legal title to property seized by an ordinary trespass, he can bring his action of ejectment to recover possession of such property; but, where the property is in the custody of the court, as when it is in the possession of a receiver, the course to be pursued, if it appears there is a legal title, is to obtain leave of the court to bring an action in ejectment. *Angel v. Smith*, 9 Ves. 335; *Brooks v. Greathed*, 1 Jac. & Wul. 176.

REASONS OF THE JUDGES OF THE COURT BELOW.

BROWN V. GUGY ⁴

124. In rendering judgment, the judges of the inferior court should state publicly their reasons, and not reserve

¹ Island of Trinidad, 1842 May 18, III Moore 490.

² Cape of Good Hope, 1860 June 26, XIV Moore 60.

³ Bombay, 1854 Feb. 11, VII Moore 90.

⁴ Lower Canada, 1863 Dec. 8, II Moore N. S.

REASONS OF THE JUDGES OF THE COURT BELOW.

them to influence the decision of the court where the appeal is taken.

LORD KINGSDOWN, p. 365 :—The other subject to which we think it fit to advert is this. Two of the judges have sent home long and very elaborate arguments, supported by a citation of numerous authorities, against the decision of the majority of the court. It was asserted by the respondent, without any contradiction on the part of the appellant, that these arguments were not delivered by the dissenting judges at the hearing of the cause, but were first made known to the parties by being printed as part of the record before us. If the statement thus made be accurate, we must say with all respect for those learned persons, that the course so pursued by them appears to us open to great objection. We think that their reasons for dissenting from their colleagues should have been stated publicly at the hearing below, and should not have been reserved to influence the decision in the court of Appeal.

We have thought it due to the general interest of the suitors in the colony to make these remarks, in order to prevent what has been done from growing into a practice, though it may not have produced any mischief in this particular case.

RICHER V. VOYER ¹

125. Notes of one of the judges in the court below communicated to one of the parties, and not sent to the Registrar, are an undue preference, and their Lordships will not take communication of these reasons.

**COLONIAL INSURANCE COMPANY OF NEW ZEALAND V. ADELAIDE
MARINE INSURANCE COMPANY ²**

126. Their Lordships in this cause remarked upon the absence of the reasons of the judges in rendering their judgment, as it is most desirable that the judges in the colonies should always comply with the rule.

BAUDAINS V. LIQUIDATORS OF JERSEY BANKING COMPANY ³

127. The rule that the notes of the judges should be put before the Judicial Committee does not apply where the law forbids the judges to take notes which will form part of the record; as in such case the notes taken by the judge should be regarded only as private memoranda.

LORD HOBHOUSE, p. 833 :—Those notes are the notes of the judge; and in cases where it is the judge's duty to take notes it may be most proper to have the judge's notes before the Privy Council—in

¹ Quebec, 1874 May 2, L. R. V P. C. 481.

² Australia, 1886 Dec. 18, L. R. XII Appeal Cases 128.

³ Jersey, 1888 July 7, L. R. XIII Appeal Cases 832.

REASONS OF THE JUDGES OF THE COURT BELOW.

fact it is a matter of common practice in jury trials ; but by the law and practice of Jersey, it is not the judge's duty to take notes ; on the contrary the judge appears to be forbidden to take notes which shall form part of the record. In that case the judge's notes are mere private *memoranda* for the assistance of his own memory ; and he may only take down such points as he desires to direct his own attention to in the conduct of the case. Such notes might be misleading to the last degree. There might be an important point taken down for one party, and the counter point for the other party, which would qualify it, not taken down ; and though such notes might suit the purpose of the judge very well, it would be very improper to have them before the Court of Appeal.

RIGHT TO BRING AN ACTION. See ACTION : *iusdem verbis*.

RECUSATION OF JUDGES.**BECQUET V. LEMPRIÈRE**¹

128. The relationship which is formed by marriage is not dissolved by the death of one of the parties without issue, so that a husband, whose wife died without children, cannot afterwards act as a judge in a cause to which his nephew is a party.

SIR JOHN LEACH, MASTER OF THE ROLLS, p. 380 :—Their Lordships are of opinion that the decease of the aunt would not dissolve the bonds of affection which her husband might entertain towards her nephew. Suppose a case was to come on the day after the death of the aunt, would the affection which bound him the day before not exist the day after ? It would be most difficult to draw such a distinction. The connections which are formed by marriage are not dissolved by the death of one of the parties, and therefore the judgment of the court below must be reversed.

REPRIME D'INSTANCE.**LA CLOCHE V. LA CLOCHE**²

129. Pending an appeal the respondent died intestate leaving children, who, by reason of litigation respecting their father's rights of succession, objected to be made respondents.

The Judicial Committee directed the petition to revive to stand over, with liberty to apply to the Royal court of Jersey to appoint a proper person to represent the estate.

The Royal Court appointed the Viscount of the Island as official representative of the estate, and the appeal was revived in his name.

¹ Jersey, 1830 July 14, 1 Knapp 376.

² Jersey, 1872 June 28, IX Moore N. S. 87.

RE-HEARING.

MOTZ V. MOREAU ¹

130. The Judicial Committee refused a petition for a re-hearing of an appeal, the petition being based on the ground that the judgment of the Judicial Committee had been formed upon certain documents which were improperly included by the clerk of appeals in the transcript of proceedings, although they had been excluded from the record by the court below.

Their Lordships refused the application as it appeared that the petitioner had not objected to the documents forming part of the transcript, and had sought to take advantage of such documents as evidence at the hearing of the appeal.

Ex parte KISTO NAUTH ROY ²

131. An application for the re-hearing of an appeal was refused. Owing to the default of the respondent's attorney, the appeal was heard *ex-parte* and an order in council was made. Then the agent sought to have the appeal re-heard.

A re-hearing will not be allowed except under very special circumstances; and the agent's negligence is not a good and sufficient reason to obtain it.

VENKATA NARASIMA V. THE COURT OF WARDS ³

132. In this appeal, both parties had been fully heard upon the merits, and the judgment had been given and reported to Her Majesty, and confirmed by regular Order in council. A petition was made for re-hearing based on a relevant case of new matter, but the petition was refused.

LORD WATSON, p. 663:—It is quite true that there may be exceptional circumstances which will warrant this Board, even after their advice has been acted upon by Her Majesty in Council, in allowing a case to be re-heard at the instance of one of the parties.

(*Their Lordships mentioned, as instances, cases where informalities in the conduct of suits from their inception to their close might be shown in framing the judgment, or where it did not fully and accurately express what the Board intended to decide.*)

The cause of *Rajunder Narain Rae v. Bijai, Govind Sing*, 2 *Moore's Ind. App. Ca.* 181, was referred to with the following citation: "It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a court of last resort, where by some accident, without any blame, the party has not been heard, and an order has been inadvertently made as if the party had been heard."

¹ Lower Canada, 1859 July 7, XIII Moore 376.

² Calcutta, 1869 Feb. 2, V Moore N. S. 373 and VI Moore N. S. 360.

³ Madras, 1886 July 17, L. R. Appeal Cases 660.

RE-HEARING.

Even before the report, whilst the decision of the Board is not yet *res judicata*, great caution has been observed in permitting the rehearing of appeals. In the last case to which we were referred, that of *Hebbert v. Purchas*, L. R. 13 P. C. 664, where a litigant alleged, before report and approval, that he had been disabled by want of means from appearing and maintaining his case, the Lord Chancellor said: "Having carefully weighed the arguments, and considering the great public mischief which would arise on any doubt being thrown on the finality of the decision of the judicial committee, their Lordships are of opinion that expediency requires that the prayer for the petition should not be acceded to, and that it should be refused." There is a salutary maxim which ought to be observed by all courts of last resort. *Interest reipublicæ ut sit finis litium*.

See PRACTICE: *power of rectifying errors in judgments*.

RULES OF PRACTICE.

In re WELLS ¹

133. The chief justice of the Supreme Court of Grenada cannot make new rules of practice alone and without the concurrence of the assistant judges.

RULE SECUNDUM ALLEGATA ET PROBATA.

ZUCASTI v. LAMER. "THE NORTH AMERICAN" ²

134. The rule that the court is bound by the pleadings and the evidence adduced must be strictly adhered to.

LORD KINGSDOWN. p. 334:—It is material to attend to the case as set up in the pleadings, and sworn to by the witnesses on each side, for we must proceed *secundum allegata et probata*, though we may entertain some doubt whether, in so doing, we shall arrive at the real truth and justice of the case.

MALCOMSON v. CLAYTON. "THE ANN" ³

135. In a case of collision the plaintiff alleged that the collision took place because the "*Ann*" had suddenly and improperly starboarded her helm, whereas it was proved that the collision arose from the "*Ann*" not having altered her course till the last moment when the accident was inevitable, and that the "*Ann*" had not starboarded her helm at all, but ported it too late. The suit was dismissed as this was an entire variance from the cause of action as stated in the pleadings. The case must be proved in the manner in which it is alleged. It is not enough to establish by evidence that

¹ Grenada, 1840 July 8, III Moore 216.

² Admiralty, 1858 Dec. 4, XII Moore 331.

³ Admiralty, 1860 March 7, XIII Moore 198.

RULE SECUNDUM ALLEGATA ET PROBATA.

the default was committed in another manner, although the result would be the same upon the merits, as the court will confine its judgment to the issues raised upon the pleadings.

THE RIGHT HON. LORD CHELMSFORD, p. 506:—Now, it is a rule, and a most important rule, to be observed in all Courts, that a party complaining of an injury, and suing for redress, must recover only *secundum allegata et probata*. There is no hardship or injustice in adhering strictly to this rule against the complainant, for he knows the nature of the wrong for which he seeks a remedy, and can easily state it with precision and accuracy. But great inconvenience would follow to the opposite party unless this strictness was required, because he might constantly be exposed to the disadvantage of having prepared himself to meet one state of facts, and of finding himself suddenly and unexpectedly confronted by a totally different one. The great object of all Courts where trials of fact take place ought to be to bring the parties to a distinct agreement as to what is in contest between them, and this object would be entirely frustrated if it were competent to a party to place his right to redress on one ground, and then to abandon it at the trial for another, although the latter ground would originally have given him a right to recover against the other party. Their Lordships have, in a recent case before them, held that parties are bound by the statements which they make in their pleadings in the Court of Admiralty.

KILGOUR V. ALEXANDER. THE "EAST LOTHIAN" ¹

136. The principle laid down in the cases of the "*Ann*" and the "*North American*" that a party can only succeed *secundum allegata et probata*, is to be strictly adhered to, but that rule applies only to the party proceeding to recover the damage sustained, to wit, the plaintiff; when the party proceeded against, to wit, the defendant, pleads a certain fact as the cause of the collision, and, in answer to the action, fails to prove his allegation, the plaintiff must nevertheless establish his case according to his own pleadings and evidence, and not depend upon the failure of the defence set up by the defendant. See the remarks of Lord Westbury in the case of *Inman v. Reck. Collision: parties in fault*.

THE "ALICE" AND THE "ROSITA" ²

137. The rule that a party seeking redress for an injury can only recover "*secundum allegata et probata*," applies only to cases where the averments alleged in the pleadings are material to the issue raised.

¹ Admiralty, 1860 Dec. 13, XIV Moore 173.

² Admiralty, 1868 Nov. 28, V Moore N. S. 300

RULE SECUNDUM ALLEGATA ET PROBATA.

When, therefore, in a case of collision caused by a vessel drifting and driving down upon another at anchor in the same anchorage, though the relative bearing of the two vessels previous to the collision was incorrectly pleaded and alleged by the vessel proved to be entitled to redress, it was held by the Judicial Committee, that the vessels not being in motion, their previous relative bearing when at anchor was not a fact material to the issue, namely which vessel caused the collision, so as to render the actual proof of the damage of no avail, and to entitle the offending party to the benefit of the rule.

BEAR V. STEVENSON¹

138. If there is one case more than another in which a plaintiff ought to be bound to his allegations, and to recover *secundum allegata et probata*, it is a case in which the defendant is charged with a false and fraudulent representation, or in which he is charged with having conspired with another person to induce a third person to make a false and fraudulent representation.

SECURITY FOR COSTS.**GEORGE V. THE QUEEN²**

139. If an action *in rem* contains two demands, one of them subject to the giving of security for costs by the plaintiff under the rules of practice, a decree rejecting the whole action for non compliance with the rule, is wrong. The plaintiff should have been heard in the case not coming under the rule.

SERVICE IN PERSONAL ACTION.**LANG & Co. v. REID & Co³**

140. According to the French law, prevailing in *Mauritius*, an action may be served on defendant's agent in a place where that defendant has a domicile. The power of attorney of an agent to sue for the defendant conferred no power upon the agent to accept service of process, or to elect a domicile for his principal.

THE RIGHT HON. T. PEMBERTON LEIGH, p. 97:—Assuming this to be so, it becomes necessary to inquire what is held to be necessary by the French law, in order to give jurisdiction to a court of justice over a defendant in a civil action.

¹ Victoria. 1874 Jan. 22, XXX Law Times N. S. 177.

² V. A. Sierra Leone, 1866 Dec. 10, IV Moore N. S. 287.

³ Mauritius, 1858 June 16, XII Moore 72

SERVICE IN PERSONAL ACTION.

It is unnecessary to consider the case of a proceeding *in rem*, for this is a mere personal liability attaching upon, and to be enforced against the debtor; in such a case the law of *domicilium rei site* can have no application, for the *res* itself has no *situs*. The matter in dispute here has no locality. In such cases the rule of the French law is that the suit must follow the person of the debtor, and that the action must be brought against him in his real and proper domicile—*domicile réel*. But this rule is subject to the qualification that a man may elect a special domicile for the purpose of his trade or for other purposes, and that such elected or conventional domicile shall for those purposes be equivalent to his *domicile réel*.

But inasmuch as the election of such domicile draws after it most grave and extensive liabilities, it is settled not only that the appointment of an agent in a colony, with the largest powers, by a domiciled Frenchman, does not amount to an election of domicile in the place where such power is to be executed, but that no agent, with powers however extensive, can make such election on the part of his principal, unless his power contains express authority to do so.

These propositions appear to be fully warranted by the authorities mentioned in the very able judgment of the chief justice in this case, and the others which were cited in the arguments at the bar.

ROYAL MAIL STEAM PACKET COMPANY V. BRAHAM¹

141. The appellant was a company doing business in Jamaica, and having an office there with its principal office in London. A writ of summons in an action of damages, arising out of a contract, was served, in pursuance of a judge's order, on the superintendent of the company in Jamaica.

This service, under section 18th of the Procedure Act which is as follows: "when the defendant has in Jamaica an agent authorized to bring actions for the defendant, service upon such agent shall be equivalent to service upon the defendant," was held good.

SEVERANCE OF LAW AND FACTS IN JURY TRIALS.**TOBIN V. MURISSON²**

142. A special verdict by the jury must be an appreciation of the facts of the case only, from which the court will draw the conclusions in law and pronounce the judgment, and the verdict should not leave facts to the court to draw an inference, such as, whether or not negligence has been established; negligence being a question of fact and not of law. In such case a new trial will be granted.

¹ Jamaica, 1877 March 10, L. R. II Appeal Cases 387.

² Lower Canada, 1845 June 17, V Moore 110.

SEVERANCE OF LAW AND FACTS IN JURY TRIALS.

LORD BROUGHAM, p. 125:—There is no reason to hold, that the niceties of our pleadings are applicable to a proceeding in the North American colonies, which are under the French, and not the English law. Those rules may neither govern the pleadings, nor the verdict, nor the judgment; in short, we may assume, that no part of the record is subject to them. Nevertheless, without descending to the particulars of our system, some things must of necessity belong to whatever proceeding involves the trial by jury. The matter of law, and the matter of fact, must be kept separate; without the severance of the two neighbouring provinces of judge and jury, the trial by jury cannot, in any intelligible or consistent sense, be said to exist. So the nature of a special verdict, which flows immediately from that severance, that distinction of law and fact, of the two functions of judge and jury, must be the same wherever there is trial by jury. A special verdict must be a finding of the facts by the jury, from which the court is to pronounce its judgment on the law. The jury should not leave the fact to the court, or, stating the evidence, leave its result in point of fact to the court; yet, in the present instance, the action being for negligence, the special verdict finds facts, and leaves the court to say whether negligence has, or not, been proved. Negligence is a question of fact, not of law, and should have been disposed of by the jury.

WHITE V. THE WESTERN ASSURANCE COMPANY¹

143. The duty of the court where the jury gives answers which are more a question of law than of fact was explained as follows by the Judicial Committee.

PER CURIAM:—Whatever answer the jury give on questions of fact which are put to them, the court would be bound by, subject, of course, to this: that if the answer was not satisfactory the court might order a new trial. But it appears to their Lordships that if the jury in answering a question really only give an answer which is an answer to a question of law, and not an answer to a question of fact at all, the court in giving their judgment, and entering the verdict according to the findings of the jury, are to decide the question according to the correct decision in point of law, and not according to any erroneous statement or findings of the jury in that respect.

SOLICITORS PRACTISING BEFORE THE PRIVY COUNCIL.*In re TWIDALE'S PETITION*²

144. Under sect. 2 and 3 of the rules of 31st of March, 1870, only solicitors practising in London, or solicitors admitted by the High courts in India or the corresponding courts in the colonies, can be admitted to practise before the Privy

¹ Quebec, 1875 March 9, 7 R. L. 106.

² Engleau, 1888 Dec. 6, L. R. XIV Appeal Cases 328.

SOLICITORS PRACTISING BEFORE THE PRIVY COUNCIL.

Council. The Judicial Committee have no power to extend at their discretion the class of those eligible.

TAXATION OF BILLS OF COSTS.

DUFFETT v. McEVROY ¹

145. The courts of Victoria can refer an attorney's bill of costs for taxation even after it has been paid, provided application is made within twelve months after payment.

146. The courts can also order from an attorney the delivery of his bill whether it is one liable to taxation or not.

O'ROURKE ET AL v. COMMISSIONERS FOR RAILWAYS ²

147. The appellants having constructed a railway for the respondents, claimed by action a sum of £100,000 as the balance due on the contract. The dispute was referred to arbitrators, by consent, and it was agreed as follows: "*The costs of this action, and of the arbitration, and incidental to arbitration, and of the award, to follow the verdict so to be entered and to be taxed in the ordinary manner.*" The arbitrators awarded to appellants £20,433 10s. 11d., and a further sum of £2,983 15s. for costs. At the taxation of the bill by the prothonotary, the respondent submitted that the costs should be taxed in proportion to the success of each party, and claimed that he succeeded for the difference between £100,000 and the award, and that he should have costs in that proportion. The prothonotary and the court below maintained his pretensions and held the costs to be divisible according to the amounts for which each party had succeeded.

The Judicial Committee reversed this judgment and held that the award of the arbitrators being in favour of the appellants carried the costs to the extent of the sum allowed; and that no evidence could be admitted at the taxation of the costs to explain or contradict the award.—*Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Traherne v. Gardner*, 8 E. & B. 161; *Little v. Sandeman*, 1 N. S. W. L. R. 263; *Williams v. Great Western Ry Co.*, 8 M. & W. 856; *Wilcox v. Wilcox*, 4 Ex. 500; *Crawshaw v. York and North Midland Ry Co.*, 21 L. J. (Q. B.) 274; *Anderson v. Chapman*, 5 M. & W. 483; *Whitworth v. Hulse*, L. R. 1 Ex. 251.

¹ Victoria, 1885 Feb. 5, L. R. X. Appeal Cases 300.

² New South Wales, 1890 June 28, L. R. XV Appeal Cases 371.

THIRD PARTIES IN SUIT.**LINDSAY V. ORIENTAL BANK ¹**

148. The question whether third parties ought to have been made parties to a suit, is an objection of form, and not of substance; and is one, therefore, which the Judicial Committee will not take into consideration.

See on this question several cases in PRACTICE: objections not raised in the court below.

VERDICT AGAINST EVIDENCE.**LAMBKIN V. SOUTH EASTERN RAILWAY COMPANY ²**

149. In an action of damages against a railway company, for injury done by the negligence of their servants, the jury found for plaintiff and granted \$7000. A new trial was granted on the ground that the verdict was against the evidence and that the damages were excessive.

With respect to the verdict being against evidence, it appeared to their Lordships that the question of evidence was one of fact for the jury, and the finding of the jury under the circumstances was not excessive. *See same case in RAILWAY: responsibility of.*

PHILLIP V. MARTIN ³

150. A verdict of a jury will not be disturbed as against evidence or the weight of evidence, unless it is one which a jury, viewing the whole of the evidence reasonably, could not properly find. *See Metropolitan Railway Company v. Wright, 11 Appeal cases 152.*

BROWN V. COMMISSIONERS FOR RAILWAYS ⁴

151. The lands of the appellants were taken for the purpose of constructing a railway. The compensation to be allowed was, under the Colonial Railway Act, 22 Vict., No. 19, referred to arbitrators and fixed at the sum of £6,555. The appellants, being dissatisfied, took an action claiming not only an indemnity for the land taken, but also for the value of two seams of coal alleged to be underlying, and for the severance of appellant's land; the sum demanded was £20,000. The jury granted £6,600. A rule nisi for a new trial was granted on the ground that the verdict was against the evidence.

The Judicial Committee allowed the appeal with costs as the question at issue was a matter to be determined by the

¹ Ceylon, 1860 Jan. 23, III Law Times, N. S. 108.

² Quebec, 1880 Feb. 3, L. R. V Appeal Cases 352.

³ New South Wales, 1890 Jan. 28, L. R. Appeal Cases 193.

⁴ New South Wales, 1890 March 15, L. R. XV Appeal Cases 240.

VERDICT AGAINST EVIDENCE.

jury, and as the verdict was one that a jury could reasonably find.

PRATICIEN

See EXPERT, PRACTICE.

PRECEDENCE

See PREROGATIVES OF THE CROWN : *precedence of judges.*

PRECIOUS METALS

See CROWN LANDS, LEGISLATURE : *legislative powers : iisdem verbis.*

PRESCRIPTION**AGAINST SEIGNIORS.**

MACDONALD V. LAMB ¹

152. The action was by a seignior to recover possession of a piece of ungranted land forming part of his *seigneurie*, against a party claiming under a private writing from one who had no title-deed, but who, with the defendant had been in undisturbed possession for thirty years.

Held, that the plea of prescription of thirty years' possession was a bar to the action, and, that it made no difference that during the time of such adverse possession the *Seigneur* had, under the statute 6th Geo. IV, c. 53, for the extinction of fendal and seignioral rights in the province of Lower Canada, surrendered the *seigneurie* to the crown for the purpose of commuting the terms into free and common socage, the issuing of the letters patent regranting the same being *uno flatu* with the surrender to the crown, and that, both by the ancient French law in force in Lower Canada and by the English law, prescription ran in favour of a party in actual possession for thirty years; and that such adverse possession enured in favour of a party claiming title to the land through his predecessor in possession.

153. Such junction of possession does not require a title *translatif de propriété*, but any kind of informal writing *sous seing privé* supported by verbal evidence, is sufficient to establish the transfer.

AGAINST VOIDABLE CONTRACT.

GODFRAY V. GODFRAY ²

154. According to the law prevailing in Jersey, parties wronged in contracts are allowed a period of thirty years, to be relieved from their bargains reckoning from the date thereof, but the ratio of inadequacy of consideration must be

¹ Lower Canada, 1867 June 21, IV Moore N. S. 486.

² Jersey, 1865 July 27, III Moore N. S. 346.

AGAINST VOIDABLE CONTRACT.

strictly defined, and proof must be made by the plaintiff that less than half the value has been given for the property purchased. *See remarks of Lord Turner. Sale : future succession.*

HIGHWAY.

TURNER v. WALSH ¹

155. In a colony, as well as in England, long continued user of a highway by the public, whether the land belonged to the crown or to a private owner, is a presumption of a dedication of the road. *The Queen v. The Inhabitants of East Mark*, 11 Q. B. 877; *The Queen v. Petrie*, 4 E. & B. 737.

See HIGHWAY.

INTERRUPTION OF

BENEST v. PIPON ²

156. In order to interrupt prescription, a trespasser must establish by legal evidence that the acts claimed in his favour were known to the claimant.

LORD WYNFORD, p. 70 :—We agree with the counsel for the respondent that a claim is not interrupted by trespasses, but if the trespasses frequently happen, and no legal proceedings are instituted in consequence of them, they then become the "*legitimæ interruptiones*" which Bracton speaks of, and are converted into assertions of right

IN SALE OF FUTURE SUCCESSION.

GODFRAY v. GODFRAY ³

157. According to the law prevailing in Jersey a sale by an heir of his future succession, in the absence of fraud or inadequacy of consideration, cannot be impeached after the lapse of a year and a day from the time of the opening of the succession. If within that time no suit is instituted to set aside the purchase, the deed becomes absolute and indefeasible. Such contract of sale is not absolutely void, but voidable. *See remarks of Lord Turner in this case. SALE : future succession.*

OF MORTGAGED ESTATE.

SMYTH v. SIMPSON ⁴

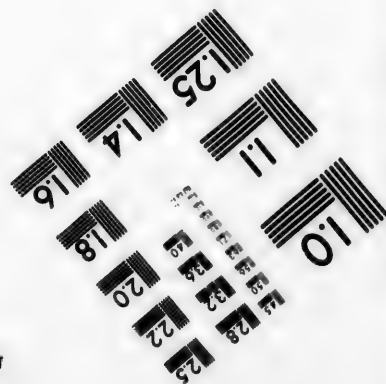
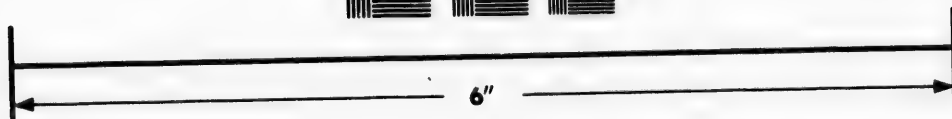
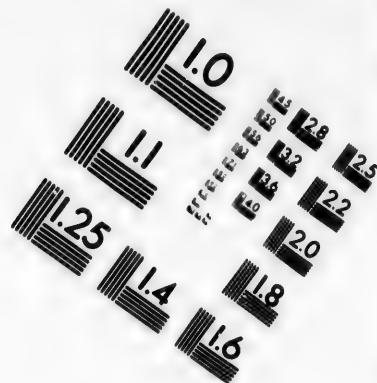
158. A mortgagee who can establish an uninterrupted possession of an immoveable during twenty years, without any dealings with the mortgagor, can oppose such possession as a bar to an action to redeem the estate.

¹ New South Wales, 1881 May 21, L. R. VI Appeal Cases 636.

² Jersey, 1829 July 9, 1 Knapp 70.

³ Jersey, 1865 July 27, 111 Moore N. S. 316.

⁴ Upper Canada, 1850 June 25, VII Moore 205.



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PRÉSENTS ET ABSENTS.BEAUCE V. MUTER ¹

159. A person residing in France, but having a representative in Saint-Lucia, is not subject to the ten years prescription *entre présents* mentioned in the *Coutume de Paris*, article CXIV.

160. Such representation does not create a constructive domicile in the Island. 3 *Burge's Com. on Col. Law*, 48; 8 *Pothier, Prescription* No. 107.

POSSESSION.BENEST V. PIPON ²

161. The possession necessary to constitute a title by prescription must be uninterrupted and peaceable, both according to the law of England, the civil law, and that of France, Normandy and Jersey.

LORD WYNFORD, p. 69: — "The Roman law relative to prescription has been adopted into the law of Normandy which prevails in Jersey. We profess to act on the same principles. We say, on the authority of the commentators on the civil law, that the right which is to be supported by prescription must have existed beyond the memory of man. They have fixed on the term of 30 years as exceeding that period. Our law has carried the time of legal memory back to the return of Richard I, from the Holy Land. The sort of possession that is required to establish a prescription, is the same in the civil law, the law of Jersey, and our common law. Whoever, indeed, will take the trouble to read Bracton, and our other early writers on the common law, will be surprised to find the number of doctrines they have adopted, and even whole passages, that they have transcribed from the civil law. The possession must be maintained without force; it ought not to be a secret or precarious possession; it must be a "*possessio longa, continua et pacifica, nec sit legitima interruptio*." Lord Coke has translated from Bracton the three first words of this passage in his description of the possession necessary to support a prescription, by saying it must be "long, continued and peaceable." This is precisely what is said of prescription by the commentator on the laws of Normandy, which are those of Jersey. The Code Napoleon makes use of nearly the same expressions on this subject."

CLARK V. ELPHINSTONE ³

162. The laws of Ceylon on limitation require ten years of possession undisturbed and uninterrupted to acquire title to disputed land.

163. The fact of works having been done on land is

1 St. Lucia, 1845 Jan. 17, V Moore 69.

2 Jersey, 1829 July 9, I Knapp 60.

3 Ceylon, 1880 Nov. 25, L. R. VI Appeal Cases.

POSSESSION.

generally a presumption of the possession of the land, but acts of ownership on land afford no presumption in a disputed boundary suit.

AGENCY COMPANY V. SHORT ¹

164. Under the statute of limitations (3 and 4 Will. 4, ch. 27). if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place.

165. There is no difference in principle between the case of mines and the case of other lands where the fact of possession is more open and notorious. *McDonnell v. McKinly*, 10 Ir. L. R. 514; *Smith v. Lloyd*, 9 Exch. (Kelsby, H. & Gord) 562.

RENUNCIATION TO

COMMISSIONERS OF FRENCH HOEK V. HUGO ²

166. When a person had obtained from the crown the right to divert the water from two springs, under the reserve of the rights of other interested parties, and had acquired a title by prescription by a long and constant user, and his heir and successor applied to the crown for the same privilege which was granted under the condition that it might be revoked at any time by the government: held, by the Judicial Committee, that the demand of the successor was not a renunciation to the prescription acquired by the former proprietor, and that the successor might oppose prescription against a grantee of the government.

SERVITUDE

DORION V. LE SÉMINAIRE DE ST. SULPICE ³

167. The obligation to maintain and repair a road created by contract is a servitude, and the obligation to repair cannot be separated from that of maintaining the road. So where the road has been maintained without interruption, but no repair done under the contract for a period of time exceeding ten years, the obligation to repair is not prescribed under article 2251 of the Civil Code.

SIR MONTAGUE E. SMITH, p. 370:—The next question is, whether the right to insist on this servitude has been taken away by prescription. The question arose below, and has been argued at the

¹ New South Wales, 1888 Aug. 1, L. R. XIII Appeal Cases 793.

² Cape of Good Hope, 1886 March 27, LIV Law Times N. S. 93.

³ Quebec, 1880 Feb. 10, L. R. V Appeal Cases 362.

SERVITUDE.

bar, whether the case falls within article 2251, which gives a prescription of ten years, or article 562, which gives a prescription of thirty years. It was admitted that the latter had not moved against the right in point of time. Then supposing that the appellant is right in considering that article 2251 is applicable to the case, their Lordships think that the right is not prescribed by it. That article is as follows: "He who acquires a corporal immoveable in good faith under a translatory title prescribes the ownership thereof, and liberates himself from the servitudes, charges, and hypothecs upon it by an effective possession in virtue of such title during ten years." If this servitude were to be regarded as a mere obligation to defray certain charges as an independent servitude, it may be that it would have been prescribed under this article, inasmuch as no repairs had been done, and no claim made in respect of them for a period of ten years. But the servitude, as their Lordships understand it, and as they have already intimated, was not of this nature; and it appears to them that the obligation to repair cannot, for this purpose, be regarded separately from the obligation to allow the land to be used as a road. Then, if that be so, the land has been constantly used as a road, and, therefore, the appellant has not had an effective possession for ten years in virtue of his title against the servitude so understood.

TIME TO PRESCRIBE.**THE EAST INDIA COMPANY V. ODITCHURN PAUL**¹

168. In an action of damages for the breach of a contract, prescription runs from the time of the breach of the contract which is the cause of action, even where there is fraud on the part of the defendant, and not from the time of the refusal to perform the contract. *Batley v. Faulkner*, 3 Bar. & Ald. 288; *Short v. McCarthy*, ib. 626; *Brown v. Howard*, 2 Brod. & Bing 73.

169. The law of England on prescription is in force in East India.

HOGAN V. HAND²

170. A tenant at will who is in possession of the land leased during thirty seven years, the proprietor being absent from the country, does not prescribe the land, under the statute 3rd and 4th Will. IV. ch. 27.

171. When a person against whom the twenty years prescription runs under the above statute is beyond the seas, at the time when his title accrues, he saves his right for ten years more.

DAY V. DAY³

172. A tenant at will during more than twenty years, in

¹ Bengal, 1849 Dec. 6, VII Moore 85.

² New South Wales, 1861 Feb. 7, XIV Moore 310.

³ New South Wales, 1871 July 17, VIII Moore N. S. 152.

TIME TO PRESCRIBE.

possession of an immoveable without interruption, publicly, uncontested by the owner in fee who is present, prescribes the land and obtains an indefeasible title under the Statute of limitations 3 and 4 Vict., 4 ch. 27, in force in New South Wales.

TITLE.

MACDONALD V. LAMB ¹

173. Where prescription of thirty years is started with a good title to prescribe or no title, junction of possession in behalf of a successor does not require a title in itself *translatif de propriété*, from one possessor to the other; but any kind of informal writing, *sous seing privé*, supported by verbal evidence, is sufficient to establish the transfer and to give to the last possessor the benefit of his author's possession.

DUNN V. LAREAU ²

174. It is sufficient to give to a possessor of real estate, in good faith during ten years, a good title to prescribe under article 2251 of the Canadian Civil Code, if the land in dispute can be identified with the land he originally bought and has possessed since.

LORD WATSON, p. 109: — According to the Civil Code of Lower Canada (Art. 2251), a person who in good faith acquires land by purchase, prescribes the ownership thereof by effective possession for ten years, which possession must be "in virtue of his title." It follows from that qualification that possession for ten years will not avail him, unless it can be ascribed to his title—in other words, his possession must be of the very subject which his title describes and professes to convey to him. A title to Blackacre cannot be made the basis of a prescriptive right to Whiteacre. In cases where possession is inconsistent with the possessor's title, he cannot acquire a prescriptive right until he has had possession for the full period of thirty years, which is sufficient to confer the right of ownership irrespective of title. If it were conclusively shown that the disputed lot is No. 103 and not No. 104; and if it could also be shown that the respondent's title merely gives him a conveyance to lot No. 104 wherever it may be found, the appellants would be entitled to prevail. It is therefore necessary to consider how far they have succeeded in establishing either of these propositions.

The fact that their author, William McGinnis, for twenty years and upwards treated the disputed land as outside his lots, and for at least nineteen years permitted the respondent to possess it as No. 104, lays a very heavy onus on the appellants. The Judge of first instance, and one of the Judges of the Court of Appeal, were of

¹ Lower Canada, 1867 June 21, IV Moore N. S. 487.

² Quebec, 1898 July 14, L. J. P. C. 108.

TITLE.

opinion that the disputed land has been shown to be lot 103, but four of the Judges of the Appeal Court came to the opposite conclusion. Their Lordships would have hesitated to differ from the majority of the Court below upon a pure question of fact; but in the view which they take of the case it is unnecessary to decide the point. The whole case of the appellants rests upon the assumption that the respondent's deed of sale conveys to him nothing more than a right to lot 104, if and wheresoever it can be found. That assumption appears to their Lordships to be erroneous. The subject sold to him is not merely described as lot No. 104, but as an area of land which had been seen and examined, lying between the property of McGinnis and and that of Daigneault. That is a specific description, not with reference to numbers, but with reference to the actual and visible state of possession of the adjoining lands; and having regard to the admitted state of possession in 1857, at the time when the respondent's deed of sale was granted, their Lordships have no hesitation in holding, with the Court of Appeal, that the description of the subject sold, completely identifies it with the land in dispute. The respondent's possession, which was in perfect good faith, was in conformity with, and must be ascribed to his title; and the lapse of ten years' possession has therefore perfected his right in competition with the appellants.

Their Lordships will humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal dismissed with costs.

USE OF WATERS.

TOBIN V. STOWELL ¹

175. Under the law of the Isle of Man, the use of a stream during fifty years for other purposes than those mentioned in a deed granting the right to use the waters for a specific object, without any objection from the proprietor, conferred an indefeasible right and title to the free use of the waters.

WHEN IT BEGINS IN MARITIME LOSSES.

BROWNING V. PROVINCIAL INSURANCE COMPANY OF CANADA ²

176. When a policy contains a clause that no action should be brought on it unless within a year after the loss was incurred, the assured is not precluded by lapse of time from bringing his action, if a year has not elapsed from the perfect certainty of the total loss.

SIR MONTAGUE E. SMITH, p. 274:—For, in this case, the insurance was not on the ship but on goods, and the point of time to be considered is not when the peril was encountered and the vessel driven ashore, but when the loss on the flour, for which indemnity is

¹ Isle of Man, 1854 Feb. 17, 1X Moore 71.

² Quebec, 1873 April 5, L. R. V. P. C. 293.

WHEN IT BEGINS IN MARITIME LOSSES.

sought, accrued. It must often be uncertain whether the damage done to cargo by a peril insured against will result in a partial or total loss; and the assured is not bound in such cases to make his election how to treat it, as soon as some incipient damage has occurred. It is obvious that, in many cases, there must be some lapse of time, greater or less according to circumstances, before the extent of the damage is developed, and that the assured must in the nature of things wait until it can be ascertained what the ultimate loss, for which he is entitled to claim indemnity will really be. See INTERNATIONAL LAW: *iisdem verbis*.

PREROGATIVE OF THE CROWN

ALIENS.

DONEGANI V. DONEGANI ¹

177. The prerogatives of the crown with regard to aliens must be determined by the laws of the particular colonies in which the questions arise, and not by the laws of England, which are only to be looked at in order to determine who are and who are not aliens.

SIR LANCELOT SHADWELL, VICE CHANCELLOR, p. 85:—The cession of Canada to the English, of course, varied the law of alienage in one respect, namely, in respect of the sovereign of the country. When the king of England became king of Canada, the natives of Canada became his subjects; Canada became part of his dominions subject to be governed by its local laws. Italians and others who were born out of the allegiance of the king of England, became aliens in Canada. By the change of sovereignty, it happened that the law of England, and not the law of France, would of necessity determine the question who were aliens or not; but when the fact of alienage was established according to the English law, the civil consequences of alienage would be determinable by the local, that is, the Canadian law.—See *Droit d'Aubaine, Alien*.

PRECEDENCE OF JUDGES.

In re JUSTICE ELZÉAR BÉDARD ²

178. A judge of a district court was removed from that court to another court of appellate jurisdiction composed of some of the judges of the first court, and the letters patent appointing him judge of the latter court, also granted him precedence over the judges of that court, whose commissions were of later date than his own.

Held, that such grant of precedence was valid, as being within the prerogative of the crown, and not an incident of office; therefore the judge had a right to rank and take precedence accordingly. See DROIT D'AUBAINE.

¹ Lower Canada 1835 Feb. 2, III Knapp 63.

² Lower Canada, 1849 July 2, VII Moore 23.

ADMISSION OF AGENT.**PRESUMPTION***See* EVIDENCE, MARRIAGE.**PRINCIPAL AND AGENT****ADMISSION OF AGENT.**BANK OF BENGAL V. EAST INDIA CO. ¹

179. An agent of the East India Company had the duty to compare each promissory note issued by the company and presented for payment, and to examine whether it was forged or genuine. In one case, he certified the genuineness of a promissory note, although it was a forged imitation. Held, that this admission did not bind the company before the courts of justice.

AGENT TOWARDS PRINCIPAL.BARTON V. MUIR ²

180. Where a man purchases land with the money of another, although there is no written evidence of the trust, a trust results in favour of the owner of the money by operation of law. He is in equity, but only in equity, the owner of the land, and has a right to compel a conveyance to himself by the agent or by such person as he may direct. He is not the purchaser, but a *cestui que trust*, and the whole legal right and legal rightful ownership is in the agent who purchased.

DUTY OF AGENT TO ACCOUNT.WILLIAMS V. STEVENS ³

181. An agent is bound to account to his principal for all gain he has made.

182. It is no answer to this rule that a person standing in the situation of trustee or agent must account to his principal for all benefit which he has obtained by virtue of that character, to say that in the course of his dealings as agent, he personally incurred responsibility and possibility of losses; if the transaction has resulted in gain obtained by virtue of the trusteeship or agency, this is sufficient to give the benefit to the principal.

FACTOR'S ADVANCES.DE COMAS V. PROST ⁴

183. Mere advances made by a factor, whether at the

¹ Calcutta, 1834 Jan. 8, III Knapp 245.

² New South Wales, 1874 Nov. 14, L. R. VI P. C. 134.

³ Island of Jersey, 1866 Nov. 9, IV Moore N. S. 235.

⁴ New South Wales, 1865 March 13, III Moore N. S. 158.

FACTOR'S ADVANCES.

time of his employment as such, or subsequently, cannot have the effect of altering the revocable nature of an authority to sell unless, the advances are accompanied by an agreement that the authority shall not be revocable. The principal has always the right to give directions as to the time and manner of sale.

FRAUD OF AGENT.**MACKAY V. COMMERCIAL BANK OF NEW BRUNSWICK**¹

184. A principal is responsible in damages or otherwise for the fraud, deceit and wrong of his agent committed in the course of the service and for the principal's benefit, though no express command or privity of the principal be proved.

185. Where an officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to a merchant which, by omitting material facts, misled him and induced him to accept a bill in which the bank was interested, and the merchant was compelled to pay the bill, it was held that he could recover from the bank the amount paid.

SIR MONTAGUE E. SMITH, p. 410:—Their Lordships regard it as settled law that a principal is answerable when he has received a benefit from the fraud of his agent, acting within the scope of his authority. The doctrine has been laid down by Lord Holt in *Hern v. Nicholls*², by Lord Ellenborough in *Alexander v. Gibson*³, by Parke, B., in *Cornfoot v. Fowke*⁴, although, under the peculiar circumstances of that case, he held the defendant not liable; also by Parke B., in *Moens v. Heynorth*⁵; by Tindal C. J., delivering the judgment of the Exchequer Chamber in *Wilson v. Fuller*⁶; and again by the court of Exchequer in *Udell v. Atherton*⁷, where, it is true, the court was divided in its judgment, but where Baron Martin, who held that the plaintiff had not proved his case, states the question to be, "Was the agent's situation such as to bring the representation he made within the scope of his authority?"

There are, however, some cases to be found apparently at variance as to the interpretation and the adaptation to circumstances of this doctrine. It is seldom possible to prove that the fraudulent act complained of was committed by the express authority of the prin-

¹ New Brunswick, 1874 March 14, L. R. V P. C. 394.

² Salk. 289. ³ Camp. 555. ⁴ 6 M. & W. 373.

⁵ 10 M. & W. 157.

⁶ 3 Q. B. 77.

⁷ 7 D. & N. 172; 30 L. J. (Ex.) 317.

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principal, or that he gave his agent general authority to commit wrongs or frauds. Indeed, it may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently that frauds are beyond "the scope of the agent's authority" in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds when it has not been proved that they authorized the particular fraud complained of or gave a general authority to commit frauds: at the same time, it is not easy to define with precision the extent to which this liability has been carried. The best definition of it, in their Lordship's judgment, is to be found in the case of *Borwick v. English Joint Stock Bank*, where the judgment of the Exchequer Chamber was delivered by one of the most learned judges who ever sat in *Westminster Hall*. In that case the plaintiff was induced to continue to supply oats to a customer of the bank, a contractor with the government, on a guarantee from its manager to the effect that the customer's cheque in the plaintiff's favour, in payment for the oats supplied, should be paid on receipt of the government money, in priority to any other payment "except to this bank." The manager fraudulently concealed from the plaintiff that the customer was indebted to the bank in £12,000: the result was that the plaintiff was induced to advance money to the customer on a guarantee which turned out to be worthless, and which the manager must have known to have been worthless when he gave it. The declaration contained, among other counts, one for deceit, in which the fraud of the manager was laid as the fraud of the bank on which count alone the judgment is based. Baron Martin having directed a nonsuit, a *venire de novo* was ordered by the Exchequer Chamber, whose judgment was delivered by Mr. Justice Willes. He expressed himself as follows:—"With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. The principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods." After enumerating other instances of its application, he proceeds:—"In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."

He further lays down, "If a man is answerable for the wrong of

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another, whether it be fraud or other wrong, it may be described in pleading as the fraud of the person who is sought to be made answerable in the action."

This doctrine was acted upon lately by the Court of Queen's Bench, in *Swift v. Winterbotham*, where they held a banking company liable in respect of a fraudulent guarantee by their manager of the solvency of a person, although the bank derived no benefit from this representation. This judgment was, indeed, reversed in the Exchequer Chamber on the ground that the signature of the manager was not the signature of the company within the words of the 9 Geo. 4, c. 14, s. 6, and that the representation was made by the manager only in his individual capacity; but Lord Coleridge in delivering the judgment observes: "This does not at all conflict with the case of *Borwick v. English Joint Stock Bank*, and cases of that description, because there can be no doubt that when an agent of a corporation, or a joint stock company, in conducting its business does something of which the joint stock company take advantage and by which they profit, or by which they may profit, and it turns out that the act which is so done by their agent is a fraudulent act, justice points out, and authority supports justice in maintaining, that they cannot afterwards repudiate the agency, and say that the act which has been done by the agent is not an act for which they are liable."

But some expressions used by Lord Chelmsford and Lord Cranworth to the effect that an action of deceit is not maintainable against a corporation in respect of frauds of its agents, have been strongly relied upon on behalf of the respondents. With all respect for everything falling from authority so high, their Lordships cannot regard these *dicta*, relating as they do to English form of action, as necessary to the decision of *Addie v. Western Bank of Scotland*. Lord Cranworth, indeed, admits that, "if by the fraud of its (i. e., an incorporated company's) agents third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by these frauds."

Upon this it may be observed that, if the fraud by which the corporation benefited consisted of a misrepresentation not forming part of or leading to a contract with it, it is difficult to see how, in many cases, they could be made responsible, except in an action for deceit. If it be suggested that an action for money had and received might lie, it may be answered that even if that were so, the question to be tried would be in substance the same, and the evidence the same, and that the time has passed when much importance was attached to mere forms of action. If the benefit received by the corporation happened to be in the shape of a specific chattel instead of money, it is difficult to see what better title they would have to retain it, but in that case the action for money had and received would not lie, and some form of action of tort would have to be resorted to. Lord Cranworth further observes, in explanation of some observations which fell from him in *Ranger v. Great Western Railway Company*: "the allegation of *Ranger* was that by the fraud of Mr. Brunel, the company's engineer, he had been induced to con-

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tract to do and had done works for them at a price grossly below their real cost, say for £20,000 instead of £40,000. The company got the full benefit of what he had so done, and, in what I said, I merely wished to guard against its being supposed that I assented to the argument that there would be no means of reaching the company, if the fact of the fraud had been established. By what particular proceedings relief could have been obtained is a matter on which I do not intend to express, and indeed had not formed, any opinion." Unless the remedy against a company in respect of the fraud of its agent is to be confined to cases where the fraud is part of a contract, and the contract can be rescinded so as to place the parties in *statu quo*—a doctrine much narrower than that laid down by Lord Cranworth—it appears to their Lordships to follow that an action of deceit is maintainable, wherein, as laid down by the Exchequer Chamber the fraud of the agent may be treated for purposes of pleading as the fraud of the principal. Nor do they see any valid reason for exempting incorporated more than unincorporated companies from this action. In their opinion, Lord Cranworth stated the law on this subject correctly in *Ranger v. Great Western Railway Co.*, when he observed: "strictly speaking, a corporation cannot of itself be guilty of a fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished by the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation.

SMIRE V. FRANCIS¹

186. An agent, acting within the scope of his authority, drew a bill of exchange on a commercial firm under false pretence of certain ordinary transactions, and fraudulently appropriated the proceeds to his own use. His principal was held responsible and condemned to refund the amount of the bill.

FRAUD OF SUB-AGENT.**BEAR V. STEVENSON**²

187. A principal agent is not responsible for the acts of a sub-agent with respect to a false representation made in favour and in the interest of the principal, unless he has actually authorised or approved such fraudulent representation.

¹ Shanghai, 1877, III L. R. Appeal Cases 106.

² Victoria, 1874 Jan. 22, XXX Law Times. N. S. 177.

HOLDER OF SHARES "IN TRUST"

BANK OF MONTREAL V. SWEENEY¹

188. A holder of shares "in trust" is not a *mandataire*, as he holds subject to a prior title on the part of some person undisclosed. Such holding not being forbidden by the law of Canada, a transferee from such holder is bound to inquire whether the transfer is authorized by the nature of the trust, or he takes it at its own risk.

LORD HALSBURY L. C., p. 622:—Their Lordships are led to this conclusion by the ordinary rules of justice as between man and man, and the ordinary expectations of mankind in transacting their affairs. If indeed they found any principle of Quebec law which absolutely forbade that property should be placed in the name of a person, with a simultaneous notice providing that his power over it should not be absolute but restricted, that would control their decision. That view has been pressed upon them from the bar with great ability and force, but, as they hold, without authority to support it. The authorities cited relate to *mandataires-prête-noms*, and are to the effect that, when property has been placed under the dominion of such an agent, third parties may safely deal with him alone, even though notice is given to them that his principal is not assenting to his acts. Their Lordships think it unnecessary to examine this statement of the powers of a *mandataire-prête-nom*, for they find no definition or description of such an agent which does not require that he should have a *titre apparent*, which they understand to mean that he must be ostensible owner, made to appear to the world as absolute owner. They asked whether there was any text or case to shew that an agent can be a *mandataire-prête-nom* when the instrument conferring the property on him carried upon its face a declaration that his property is qualified. No such authority could be found.

LIABILITIES OF AGENT ON INDORSEMENTS. See **BILLS OF EXCHANGE** : *rights and obligations of endorser.*

LIEN OF CONSIGNEE.

CHAMBERS V. DAVIDSON²

189. The Judicial Committee held that, when the party claiming a general lien as consignee, given by an express contract which created a mortgage on certain estates, had, by deed, stipulated for the consignment of their produce, as well as that of other plantations, subject to the rights and interests of existing mortgages then subsisting thereon, such security excluded the consignee's general lien, given by implication of law.

LORD WESTBURY, p. 169:—The ordinary mercantile character and position of a consignee of a *West India* plantation are well known.

¹ S. C. Canada, 1887 June 25, L. R. XII Appeal Cases 17.

² West Indies, 1866 Nov. 8, IV Moore N. S. 158.

LIEN OF CONSIGNEE.

The custom of the mercantile world is to select as consignee, a merchant residing in this country, to whom the whole produce of the plantation is consigned, and who, in return for that produce, accepts bills drawn upon him by the proprietor or manager in the *West Indies* for Island contingencies; and who, according to the orders of the manager or proprietor, purchases the supplies needed for the estate, and sends them over to the Island.

There is no necessity in a case of this kind that there should be any contract for the purpose of determining the right of the consignee. The right of the consignee, as it is supposed to be established by decision, giving him a lien on the plantation in respect of the balance due to him, is an exception to the general rule which applies to principal and agent.

But lien is not the result of an express contract; it is given by implication of law. If therefore a mercantile relation, which might involve a lien, is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security excludes lien, and limits their right by the extent of the express contract that they have made. *Expressum facit cessare tacitum*. If a consignee takes an express security, it excludes general lien.

LIEN FOR MONEY ADVANCED.ROGERSON V. REID ¹

190. A commercial firm in Quebec contracted, as agents for another firm in Newry, with a builder for the construction of a ship; and this latter firm sent to the former the rigging for the ship through their correspondent at Liverpool. The rigging was delivered to the Quebec firm who paid the customs duties and other expenses.

Held, that the Quebec firm had a lien for their advances, being agents and in actual possession of the rigging, although the builders had assigned the ship to them, and one of the partners registered it in his own name.

FRASER V. BURGESS ²

191. An agent employed to manage a West Indian estate by the owners, subject to the charges upon it, is not as such entitled to a lien on the lands in respect of his advances for cultivation, against those whose title is prior to that of the employers.

LIEN OF SUB-AGENT.FRASER V. BURGESS ³

192. If an agent has the possession and the administra-

¹ Lower Canada, 1830 July 14, 1 Knapp 362.

² St. Vincent, 1860 March 29, Law Times II Vol. N. S. 446.

³ St. Vincent, 1860 March 29, Law Times II vol. N. S. 446.

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tion of an estate, managing it on behalf of all the interested parties, and as such employs a sub-agent, such sub-agent has the same right and lien as the trustee who employed him, for his expenses and advances.

NEGLIGENCE OF AGENT.

THE BANK OF VAN DIEMEN'S LAND V. THE BANK OF VICTORIA¹

193. The bank appellants were indorsers of a bill drawn by a merchant, at Van Diemen, on a firm doing business in Melbourne, at fifteen days after sight. The bill was transmitted by him to the respondent, the appellants' agent at Melbourne, for presentment. The Bank of Victoria received the bill at one o'clock on Friday, and at two o'clock on the same day the bill was presented by their clerk to the drawees, for acceptance, and left with them for that purpose. On Saturday, the following day, an acceptance was written by one of the drawees across the face of the bill, and the bill so accepted was handed to a clerk to be delivered in the usual course of business, and at half past eleven o'clock on that day a clerk of the Bank of Victoria called upon the drawees and asked for the bill. He was told by the clerk of the drawees that the bill had been mislaid, and requested to call again on Monday, which he agreed to do, as, according to the custom in Melbourne, business closed at 12 o'clock on Saturdays. On Monday the clerk of the respondent called again upon the drawees, and was told that the bill was ready to be delivered, but that in the absence of the clerk who had charge of it, it could not then be got at, and he was requested to call on Tuesday. The clerk called on that day and obtained the bill, but the acceptance of the drawees was cancelled on the face of the bill, the drawees having obtained information in the interval that the remittance was not likely to be forwarded by the owner to meet the bill. The merchant became insolvent, and the bank appellants having received nothing in respect of the bill, brought an action against the Bank of Victoria as their agents, for negligence. The evidence did not show any uniform usage to present the bills the same day for acceptance. The custom to close at 12 o'clock on Saturdays was proved.

The judge put it to the jury whether they thought that the Bank of Victoria was guilty of negligence, or a breach of duty, in not demanding that the bill should be delivered up on Saturday, accepted or unaccepted, and the jury

¹ Victoria, 1871 Jan. 27, VII Moore N. S. 401.

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answered that, strictly speaking, there was a neglect, but considering the respectability of the drawees, and Saturday being a short day, the Bank of Victoria was excusable in leaving the bill. The jury found for the plaintiff with nominal damages, and an application to increase them to £3,000, the amount of the bill, was refused by the Supreme court.

The Judicial Committee held that under the circumstances, and considering the position of the drawees, there was no such negligence by the defendants as agents as to entitle the plaintiffs to substantial damages.

LORD CAIRNS, p. 423:—Now, the first question which their Lordships have to consider is what is the meaning of the term "unreasonable time" as between persons standing in this relation, for the execution by the agent of the duty which is imposed upon him. But inasmuch as the object of the transmission of a bill of this kind from principal to agent is to obtain the acceptance and the payment of the bill, or, if it is not accepted, to guard the rights of the principal against the drawer in case recourse is to be had to the drawer, their Lordships are of opinion, that the duty of the agent is to obtain acceptance of the bill, if possible, but not to press unduly for acceptance in such a way as to lead to a refusal, provided that the steps for obtaining acceptance or refusal are taken within that limit of time which will preserve the right of his principal against the drawer.

POWERS OF AGENT.

STEELE V. MURPHY ¹

194. An agent supplying an estate with necessities through a factor, cannot give to this latter a privilege for his advances against the owner of the estate.

THE MARCHIONESS OF BUTE ET AL. V. MASON ET AL. ²

195. An agent was charged with the full administration of an establishment in New South Wales, for a principal living in Scotland, with the right to purchase and sell cattle and lands; for his first instalment the agent received from his principal a certain sum of money which he invested as agreed in his own name. The agent became embarrassed financially, and, in consequence, drew bills on his principal, endorsed by a third party, but these bills were not paid, and the agent then assigned to the endorser of the bills the whole property he held in trust and some of

¹ Jamaica, 1841 June 25, 111 Moore 445.

² New South Wales, 1849 July 5, VII Moore 1.

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his own. An action was taken by the principal to set aside the deed of assignment.

The Judicial Committee held that although the agent could not bind his principal to the payment of the bills drawn by him, yet in the situation of agent and manager of the trust property he had the right to deal with the properties, to sell or pledge them for the payment of the dishonoured bills.

THE MONTREAL ASSURANCE COMPANY V. MCGILLIVRAY¹

196. The agent of an insurance company has no power to insure a house against fire and to give delay for the payment of the premiums.

In a case where a promissory note was given for the premium of a fire policy, and the building was destroyed by fire after the note had become due and dishonoured, the Judicial Committee held that the insured could not recover, as the powers of the agent, being public, must be taken to have been known to the insured, and that the acts of the agent in the transaction were *ultra vires* and void, not being within the scope of his general authority as agent, and, therefore, not binding upon the assurance company.

THE RIGHT HON. SIR JOHN COLERIDGE, p. 119:—*Hays*, acting by the authority of the Respondent, having agreed to effect an insurance for her and in her name, repaired to the office of the Appellants, on or about the 18th of February, where he saw *Murray*, who then was, and had been from its formation, the Manager of the Company; he applied to him in the usual way to effect the insurance, stating for whom it was to be; and all was proceeding in the usual way in which policies were effected, without difficulty, until it appeared that he was not prepared to pay down the premium, in lieu of which he offered his own promissory note, payable on the 1st of March following. This was at first refused, as contrary to the course of the office, and to *Murray's* instructions, but finally accepted, and the particulars of the intended policy entered in the policy order book in the usual way. The policy was to be sent when made out, but it never was made out. The note was not paid at maturity, but dishonoured and protested; the premium was never paid, and a few days after the maturity of the note, and long before the fire, the entry in the order book was crossed out by the directions of *Murray*.

Upon these facts the Appellants contended, that they had no power to effect such an insurance without a policy, as the Respondent was compelled to rely on, and that if they could, they had never constituted *Murray* their agent for the effecting of such an assurance, and consequently, that if such an insurance was in fact made

¹ Lower Canada, 1859 June 22, XIII Moore 87.

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by him, he had acted without their authority, and they were not bound by his acts. The learned Judge, in his summing up, disposes of the first point, as a matter of law, in favour of the Respondent, and then, considering only the nature of the acts done by *Murray*, assumes that in doing them he was the agent of the Appellants.

Their Lordships do not think it necessary to express any opinion on the first point; they will assume, for the purpose of their decision, that the learned Judge was right in his view of the law; nor do they deem it essential or intend to state whether, in their judgment, *Hays* was a competent witness. They assume for the present purpose in favour of the Respondent that he was so. With this remark they proceed to consider the facts on which the learned Judge's direction turns as evidence bearing on the second point; the question of agency, in fact. And upon this they think, the true question for the jury to have been, not what was the real extent of authority expressly or in fact given by the Appellants to *Murray*, but what the Appellants held him out to the world, to persons with whom they had dealings, and who had no notice of any limitation of his powers, as authorized to do for them. For it cannot be doubted, that an agent may bind his principal by acts done within the scope of his general and ostensible authority, although those acts may exceed his actual authority as between himself and his principal; the private instructions which limit that authority, and the circumstance that his acts are in excess of it, being unknown to the person with whom he is dealing.

Now, it appears that the "Montreal Fire Assurance Company" were first incorporated by that name, by the Ordinance, 4 Vict., cap. 37 (Lower Canada Acts). This act commences with a recital that the establishment of a Fire Assurance Company would be conducive to the advancement of commerce, and promote the prosperity of the Province; and incorporates certain persons, their heirs, executors, &c., and successors, by the name of "The Montreal Fire Assurance Company." They are then empowered to ordain bye-laws, ordinances, and regulations for the management of the corporation, and to do and execute, by the name aforesaid, all and singular the matters and things, touching the management of the business of the corporation, which to them shall, or may, appertain to do. By section 5, they are forbidden to commence business until a certain proportion of their capital is paid up, "nor shall any policy of insurance be at any time opened, or renewed, unless a sum equal to at least 10 per cent, on their capital stock then subscribed for, after paying all lawful demands on them, shall be then paid up, and in their hands, and at their disposal, on pain of forfeiture of their corporate capacity."

By the 6th Vict., cap. 22 (Lower Canada Acts), their powers were extended and their name changed to the "National Fire, Life, and Inland navigation Assurance company." By section 3 they were empowered to make contracts and grant policies of insurance on any life or lives, or on any contingency depending on the continuance of any life or lives, or the death of any person or persons, and to grant or purchase annuities, and to assure provisions for

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widows and children, and generally to make all such contracts of insurance depending on any such contingency as aforesaid as shall not be contrary to good morals, or to the laws of the land; and also to make contracts and grant policies of insurance against all losses or damages to ships, &c., on certain waters. A proviso follows, like that in the first Ordinance, against the opening any policy of insurance under the authority of this act until a certain proportion of the capital, after payment of all lawful demands, should be in their hands, on pain of the same penalty of forfeiture. Section 4 makes valid all policies of insurance whatever made under the authority of this or the preceding act, if subscribed by three Directors, countersigned by the Secretary and Manager, and under the seal of the Corporation, though not subscribed in the presence of a Board of Trustees, provided they be made and subscribed in conformity to a bye-law of the Corporation.

These are the laws under which the company came into existence, from which it receives all its powers, and by which they must be limited; they certainly contain no express power to make any contracts for fire insurance, except by policy, and in order as it should seem to secure the solvency of the company, the exercise of that power is guarded by specific provisions, whereas none are made in respect of fire insurances by parol. To support the direction of the learned Judge, evidence was necessary that the appellants had assumed to have the power to make contracts for fire insurances by parol, and held out *Murray* as their agent for making them, without any restriction. The burthen of proof was entirely on the respondent; the provisions of the Ordinance and Act of incorporation clearly raise no presumption in her favour.

Now, what are the remaining facts in the case? There is no evidence of express authority: *Murray* was the manager for the company; he held an office recognized in the Ordinance and Act, importing very large powers and a wide discretion; but then he was the manager for a company whose powers, in respect of policies at least, were subject to limitations, which were public, and must be taken to have been well-known. He was clearly its agent for granting policies. The evidence, taken in its result, shows that whether the practice to pay the premium down, and to issue the policy after such a delay only as the ordinary necessities of business made inevitable, had been absolutely uniform or not; yet that to give credit for the premium, or to take a promissory note for it, payable *in futuro*, and to delay the issuing of a policy indefinitely, was very rare: it shows also, that to insure without any policy eventually issuing, was entirely without precedent; that *Hays*, whose knowledge must be taken to be the knowledge of the respondent, knew all this, and was not deceived; that he had undertaken to her to effect a policy of insurance, not a parol contract of insurance; that his original application was for an insurance by policy, and that it was only his own default, in not being prepared to pay the premium, which prevented the policy from issuing in the usual way, at the usual time. It was he who prevailed on the agent to do the act which is now relied on as binding the appellants. Now *Murray* was, indeed, their

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general agent; and had he merely made an unwise contract for them, or had he been satisfied with answers which ought to have been deemed unsatisfactory; in these, and many more supposable cases (collusion on the part of the person seeking to be insured being out of the question), the company would have been clearly bound; in all such supposed cases he would have been acting within the scope of the authority which the company held him out as possessing. But if he was, and was known to be, an agent only for effecting insurances by policy on payment of a premium (and their Lordships see no evidence beyond this), then he was not their agent in the act which he really did, and they are not bound by it.

Having come to this conclusion on this point, it is unnecessary for their Lordships to pronounce any opinion on some other parts of the summing up to which objections were made in argument.

JONMENJOY COONDOL V. WATSON¹

197. A power of attorney which gave to the holders authority "for the purposes aforesaid to sign for me and in my name and on my behalf any and every contract or agreement, acceptance, or other document," the purposes aforesaid being "from time to time to negotiate, make sale, dispose of, assign and transfer" government promissory notes, and "to contract for, purchase, and accept the transfer" of the same, comprises the right to sell and purchase such notes, but not to pledge them.

PRICE V. NEAULT²

198. When a landowner had empowered his agent to alienate, and such agent, without executing a complete contract of sale, allowed an intending purchaser to take possession of a flat, and to make substantial improvements in the reasonable expectation of obtaining a transfer on paying a proper price, and then transferred to the defendant, who in turn made improvements, the Privy Council held that such landowner had thereby laid himself under an obligation, such as in Civil Code, art. 1041, is called a *quasi contrat*, to confirm the defendant's possession and title upon payment of the price thereof, according to the rate ruling at the time of commencing the improvements with interest from that date. See **BILLS OF EXCHANGE: property in bills.**

MONTAGNAC V. SHITTA³

199. The power to administer and manage a business establishment confers the authority to raise money, when

¹ Bengal, 1884 March 1, L. R. IX Appeal Cases 561.

² Quebec, 1886 Dec. 11, L. R. XII Appeal Cases 110.

³ Lagos, 1890 July 17, L. R. XV Appeal Cases 357.

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it is necessary to do so for the proper carrying on of the affairs to be administered.

200. In circumstances of emergency, the agent may even borrow on exceptional terms outside the ordinary course of business.

It is not necessary, to bind the principal, that, under those circumstances, the lender should inquire whether a particular case of necessity had arisen or not, provided he advanced the money in good faith and without notice that the agent was exceeding his powers.

POWER OF ATTORNEY MAY BE PARTLY INVALID AND PARTLY VALID.

DENYSSEN V. BOTHA ¹

201. An agent got a power of attorney to borrow money for his principal and to give a mortgage as security. The money was obtained by the agent and a mortgage by him granted. It turned out afterwards that the mortgage was invalid, and the principal repudiated the loan, but it was held by the Privy Council that the borrowing was not upon condition of the mortgage being valid, and the principal was estopped from setting this up as against the party who advanced him the money.

202. Held also, that neither the invalidity of the power of attorney to give a mortgage, nor the consequent invalidity of the mortgage or mortgage-bond was inconsistent with the validity at least of the second power as a mandate to borrow money.

POWER OF AGENT TO PLEDGE GOODS OF HIS PRINCIPAL.

GOBIND CHUNDER SEIN V. RYAN ²

203. The Factors Act, 5th and 6th Vict., was put in force in India by the Act of the Indian Legislature, No. XX of 1844.

204. A *Banian* or agent having been entrusted by his principals with a bill of lading for a particular purpose, and without the consent of his principals, pledged the same to a native banker, for advances made to himself.

Held, that in order to invalidate a pledge so made, it is necessary that the court or jury should find that the lender had notice of the agent's *mala fides* or want of authority to pledge the goods.

205. To establish such notice, it is sufficient to show that the circumstances attending the transaction were such that

¹ Cape of Good Hope, 1860 March 7, Law Times II N. S. 126.

² Calcutta, 1861 Dec. 5, XV Moore 230.

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a reasonable man of business applying his understanding to them, would certainly know that the agent had not authority to make the pledge, even if the agent was not also acting *mala fide* towards his principals.

CHUNDER SEIN V. RYAN¹

206. A third person acting in good faith who advances money on goods in the possession of an agent, who is also the bearer of the title to the goods, is within the protection of the Trader's Act, provided he does not know or has not received any notice that the agent making the contract had no authority to make the same, or that the agent was acting *mala fide* against the owner.

207. The statute does not provide as to the manner of giving notice, or what will amount to notice, or what would amount to knowledge; in such case, it must be left to the ordinary principles of evidence. The circumstances, however, must be such that a reasonable man, on applying his understanding to them, would certainly know that the agent had no authority to make the pledge or was acting in bad faith against his principal.

POWER OF DELEGATION.

THE QUEBEC RICHMOND RAILROAD COMPANY V. QUINN²

208. When the power given by one party to another by an instrument in writing is of such a nature as to require its execution by a deputy, by the law in force in Lower Canada, the party originally authorized as the agent may appoint a deputy.

209. By an act of Parliament a company was incorporated, with power to purchase land to construct a railway. The lands were to be acquired either by agreeing with the owners or by arbitration. The company afterwards entered into a contract with certain contractors for the completion of the road. It was agreed that the road should be made at the expense and charges of the contractors, who were to pay any claim which might be made against the company. To that end, the powers vested in the company by its act of incorporation were to be exercised by the contractors. By a power of attorney, the contractors who resided in England, appointed an agent, with full power to construct on their behalf the said railroad, and to enter into contracts for the purchase of land and to settle any claim for land or other

¹ Bengal, 1862 Dec. 21, V Law Times N. S. 559.

² Lower Canada, 1858 June 23, XII Moore 232.

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damages, and generally to execute all such acts and things as fully and effectually as the contractors might do.

The contractors for the company required part of respondent's land, and took possession of it; not being able to agree upon the terms, the agent for the company and the respondent referred the matter to arbitrators and "*amiables compositeurs*" to ascertain the amount that the company should pay for the land. In this agreement the agent was described as the attorney of the contractors for the works upon the railroad "acting in this behalf, in the name of the company under the authority to that effect contained in the contract between the company and the contractors."

The arbitrators awarded a certain sum for land and for damages to be paid by the contractors. The respondent applied to the company for payment, who referred him to the contractors, and the latter refused to pay the amount. He then brought an action against the company in the Superior Court in Lower Canada to recover such amount. The company pleaded in defence that the contractors, by the contract, were alone liable, and that the agent had no authority either from them, or the contractors, to refer the matter to arbitration of *amiables compositeurs*.

The Judicial Committee held that the contractors, both by the express language and the necessary effect of the contract with the company, were to be considered as agents of the company, with authority to exercise the powers vested in the company by the act of incorporation in the name of the company and to buy lands, and to make the company liable to third parties with whom they had contracted in the name of the company, for the performance of any engagement entered into on their behalf, although, as between the contractors and the company, the former were bound to supply the necessary funds.

210. That the contractors under the contract had power to delegate to an agent, powers similar to those vested in them by the company, and that under the power of attorney executed by the contractors, the agent possessed the same powers of acting and rendering the company liable, as the contractors themselves had under the contract.

211. That the company had no power to transfer their rights, created by the Canadian Act incorporating them, to the contractors, so as to relieve themselves from the responsibility which the Legislature had attached to the exercise of their powers.

212. That the action was properly brought against the

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company upon the award, as the contract with the contractors in no degree altered the position of the company with third parties, and that the agreement with their agent was made on the company's behalf, for although the company had a right, as between themselves and the contractors, to require the contractors to make payment, yet, as the contractors' agent, had entered into no personal engagement with the respondent, the contract with the company was *res inter alios acta*, with which the respondent had nothing to do.

213. That the submission to arbitration of "*amiables compositeurs*" was the proper course to pursue.

PRINCIPAL UNDISCLOSED MAY SUE AND BE SUED.

BROWNING V. PROVINCIAL INSURANCE COMPANY OF CANADA ¹

214. An undisclosed principal who makes a commercial contract, through an agent and in the name of the latter for the issuing of a marine insurance policy, may sue and be sued, subject to any defence which may exist against the agent.

215. The Canadian and the English laws are similar on this point.

SIR MONTAGUE E. SMITH, p. 272 :—In England, policies are usually made in the name of the insurance broker, and it was long ago decided that the broker need not be described as agent to enable the principal to sue upon them. See *Vignier v. Smanson*.² In a recent case, in which it was held that the plaintiff under the circumstances there existing, could not maintain an action on such a policy, because the insurance could not be shewn to have been made on his behalf, the right of the person, who, in a case like the present, has been throughout the real principal, to sue on a policy made in the name of his agent was not doubted: *Watson v. Swann*.³

By the law of England, speaking generally, an undisclosed principal may sue and be sued upon mercantile contracts made by his agent in his own name, subject to any defences or equities which without notice may exist against the agent: *Higgins v. Senior*⁴; *Colder v. Dobell*.⁵ There seems no sufficient ground for making a distinction in the case of marine policies of insurance, especially when, having regard to the ordinary course of business, it must be known they are commonly made by agents. If, indeed, any particular interest were described in the policy to belong to the person

¹ Quebec, 1875 April 5, L. R. V P. C. 263.

² 1 Bos. & Pul. 346.

³ 11 C. B. (N. S.) 756.

⁴ 8 M. & W. 834.

⁵ L. R. 6 C. P. 496.

PRINCIPAL UNDISCLOSED MAY SUE AND BE SUED.

named in it, an objection might arise founded on the rule that written contracts cannot be contradicted by parol evidence. This objection, however, does not occur in this case, where the insurance is general on the flour, and no interest is expressly described.

But if this were not the law in the case of a policy which did not contain the usual clause "as well in his own name, &c.," it is not denied that it would be so in the case of one which does; and their Lordships think that in this case the certificate ought to be construed with reference to the proved usage of the respondents to treat such document as provisional, entitling the assured to a policy in their common form, which would contain the above clause. This common form of the respondents' policy clearly shews that in their contemplation the person named in the certificate might be contracting as an agent for another; and therefore, as against them, the contract ought to be interpreted as if the above clause were contained in it. It may be observed that the condition against assignment contained in the policy cannot affect the right of the appellant, on whose behalf the contract was originally made.

The law of the Province does not appear to differ from that of England upon the question under discussion. The *Code of Lower Canada* allows policies to be made in the names of agents, art. 2492. Thus giving the express sanction of the law to well-known mercantile usage.

PRINCIPAL TOWARDS THIRD PARTIES.

MILES V. McILWRAITH¹

216. The rule as to the liability of a principal towards third parties was laid down by their Lordships, following *Freeman v. Cooke*, 2 *Ex.* 654, as follows: A person having clothed an agent with apparent general authority, but restricted it by secret instructions, is bound (if the other party chooses to hold him), to one who, in ignorance of the restrictions, contracts through the agent, on the faith of the agent having the authority he seems to have.

The principal does not actually contract, but the person who thought he did, has the option to preclude him from denying that he contracted if the case is brought within the very accurate statement of the law by *Parke, B. 2, Ex. 663*: "If the person means his representation to be acted upon, and it is acted upon accordingly; and, if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there

¹ Queensland, 1883 Feb. 27, L. R. VIII Appeal Cases 120.

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is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect."

217. But in this case the agent had instructions not to deal with the third party, and notwithstanding this restriction both made an agreement, the agent without disclosing his principal and the other party ignoring the quality of the agent. Under these circumstances the Privy Council held that the principal was not bound.

PRINCIPAL TOWARDS AGENT.

*FRIXIONE V. TAGLIAVERRO*¹

218. An agent has a right of action against his principal to recover the amount of damages sustained by him, in a suit brought against him for a breach of contract which he had defended on behalf of his principal.

219. Although an agent exceeds the scope of his authority, yet, if the principal waive or ratify the excess, the act of the agent is binding on the principal.

THE RIGHT HON. T. PEMBERTON LEIGH, p. 196:—In order to entitle an agent to recover from his principal, under such circumstances, he must show, first, that the loss arose from the fact of his agency; secondly, that he was acting within the scope of his authority; and thirdly, that the fault was not attributable to any fault or laches on his part. If the appellant can establish these facts, it is plain that he is entitled to recover, as there is no reason to doubt that the Sardinian law in this respect is the same as the law of all other civilised countries.

RATE OF EXCHANGE IN RE-PAYMENT.

*BERTRAM V. DUHAMEL*²

220. If an agent receives money under a general authority, without any agreement express or implied as to the time or place of its repayment, the rate of exchange, if any is to be paid, must be considered at the time the judgment is recorded. But if any specific time and place had been fixed by the contract of the parties for the repayment, then the rate of exchange at the time and place specified would be the measure of the amount to be recovered. *Scott v. Beaver*, 2 *Barn and Adol.* 74; *Cash v. Reunion*, 11 *Ves.* 314.

RATIFICATION EQUIVALENT TO PREVIOUS AUTHORITY.

THE SECRETARY OF STATE IN COUNCIL OF INDIA *V.* *KAMACHEE*

*BOYE SAHABA*³

221. An act done by an agent of the government, though

¹ Malta, 1856 Feb. 13, X Moore 175.

² Jersey, 1838 Feb. 14, II Moore 212.

³ Madras, 1859 July 22, XIII Moore 9.

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in excess of his authority having being ratified and adopted by the government, was held to be equivalent to an act done with previous authorization. *Buron v. Denman*; 2 *Exch. Rep.* 167, *W. H. v. Gordon*.

REMUNERATION OF AGENT.

PENNANT V. SIMPSON¹

222. In Jamaica, the agent of an absent proprietor is entitled for his remuneration to a commission of 6 % only.

DENTON V. DAVY²

223. The commission of 6 % referred to in the above case of *Pennant v. Simpson* is granted only to persons actually resident on the island, and capable of performing the duties of an agent.

224. The commission of 5 % given by the same Act, 24 Geo. 2, ch. 19, for receiving and remitting the moneys collected can only be claimed when where the receipts and payments were made in the island. See **USURY: agents' commission.**

REVOCACTION OF POWERS.

MUTUAL PROVIDENT LAND INVESTMENT AND BUILDING SOCIETY V. MACMILLAN³

225. In New South Wales, a declaration made by an agent that, before making a sale as agent, he had no notice of the revocation of his power by death or otherwise, is a conclusive proof of non-revocation when the purchaser is in good faith. In this case, this rule did not apply because the purchaser was not a *bona fide* purchaser.

VERBAL INSTRUCTIONS TO PARTNERSHIP DEED.

LEISHMAN V. COCHRANE⁴

226. A company was formed in India to carry on the business of insurance, and a resident, at Mauritius, gave special verbal instructions to the agent of the company, in India, to execute the partnership deed in his name, which was done, and his name appeared in the list of shareholders. Afterwards, on the insolvency of the company, being sued as such, he set up the defence that he was not a shareholder, for no power by deed was given to the agent to execute the partnership in his name.

¹ Jamaica, 1831 Jan. 10, 1 Knapp 399.

² Jamaica, 1836 June 15, 1 Moore 15.

³ New South Wales, 1889 July 27, L. R. XIV Appeal Cases 596.

⁴ Mauritius, 1803 July 27, IX Law Times N. S. 104.

VERBAL INSTRUCTIONS TO PASS DEED.

The Judicial Committee held that a partner might become liable in that character without having executed the partnership deed, if his name was put on the list of shareholders with his consent, so as to entitle him to share in the profits.

LORD KINGSDOWN, p. 106:—It is said that a power to execute a deed can only be validly given by deed, and that a parol authority is not sufficient for the purpose. But a partner may become liable in that character without having executed the partnership deed, and if the court were satisfied by sufficient evidence that his name had been put upon the list of shareholders with his consent, so as to entitle him to participate in the profits of the concern, their Lordships would not think it necessary to enquire whether the parol authority would warrant the execution of the deed.

PRIVILEGE**OF THE CROWN.****EXCHANGE BANK OF CANADA V. THE QUEEN¹**

227. Before the codes, the law relating to property in the province of Quebec was, except in special cases, the French law, which only gave the king priority in respect of debts due from "*comptables*," that is, officers who received and were accountable for the king's revenues.

228. The crown is now bound by the codes, and can claim no priority except under article 1994 of the Civil Code and by article 611 of the Code of Civil Procedure which give it a preference over unprivileged chirographic creditors as far as their "*comptables*" are in question, but the crown, as ordinary creditor of a bank in liquidation, is not entitled to priority of payment over its other ordinary creditors.

LORD HOBHOUSE, p. 163:—The sole ultimate question in this case is whether the Crown, being an ordinary creditor of the bank which has been put in liquidation, is entitled to priority of payment over its other ordinary creditors. That again depends on the question how the two Codes of Lower Canada are to be construed. Their Lordships think it clear, not only that the Crown is bound by the Codes, but that the subject of priorities is exhaustively dealt with by them, so that the Crown can claim no priority except what is allowed by them. If so, the other points which have been elaborately treated both in the colony and here are only of subsidiary importance, though undoubtedly they have a bearing on the construction of the Codes.

Their Lordships are also clear that the law relating to property in the province of Quebec or in Lower Canada, from 1774 to 1867, when the Codes came into force, must be taken to be the *Coutumes*

¹ Quebec, 1885 Feb. 18, L. R. XI Appeal Cases 157.

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de Paris, except in such special cases as may be shown to fall under some other law. Probably such was the true effect of the statute 14 Geo. III., chap. 83, but at all events there has been an uniform current of decision to that effect in the colony, dating back forty years or so before the date of the Codes, which ought not now to be questioned.

The next question is whether the French law gave to the king a priority in respect of all his debts, or in respect only of those due from *comptables*. There does not seem to have been any difference of opinion on the point in the colony. The three judges who decided for the Crown upon the ultimate question, and the two judges who decided the other way, all thought that the priority given by the French law extended only to *comptables*. And in the appellants' case filed on the appeal from Mr. Justice Mathieu it is elaborately argued that the English law and not the French prevailed in Lower Canada, but it is never suggested that the priority now claimed could be claimed under the French law. That suggestion, however, has been made upon this appeal to Her Majesty, and has been strongly contended for at the bar.

The matter rests wholly upon the French authorities, and it appears to their Lordships that the passage cited from *Pothier* (see *Rec.*, pp. 82-83,) is conclusive of the question unless it can be contradicted or explained away. It is not conceivable that the advisers of Louis XIV should, if an unlimited priority existed, address themselves to the exact definition by edict of a limited priority, or that Pothier should comment on that edict, all without any reference to the more sweeping rule. But so far from being contradicted or explained away, the passage in question is supported and emphasized by later authorities. There is the case reported by *Sirey* (*Rec.*, p. 83), showing one limit of the king's priority, viz., that his right against *comptables* did not extend even to purveyors who might have been paid in advance. There are the authorities cited in the note to that case, who all draw the distinction between the one kind of Crown debtor and the other. There is the authority of the *Nouveau Denisart*, expressly drawing the distinction between the official debts of the *comptable* and his private debts due to the king, and the case of the *Sieur Bouvelais* which illustrates that distinction (*Rec.* p. 139).

If the priority contended for existed in the French law, there could be no difficulty in producing authority to that effect. English text-books and reports abound with assertions of the King's prerogative as we know it. But absolutely no authority was produced in the colony in opposition to the decision of Mr. Justice Mathieu, and now nothing is produced except the work of a Counsellor of State writing in the year 1632.

Taking the French law to be as laid down by the whole of the judges below, the next question is, what is the proper construction of Art. 1994 of the Civil Code? And the only difficulty in it, when considered alone, arises from the use of the expressions "*ses comptables*" and "persons accountable for its moneys." Here again we have complete accord among the judges in the colony, that the ex-

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pressions indicate not all the debtors of the Crown, but a limited class of such debtors, known to French lawyers under the name of *comptables*. The strongest expression of opinion to that effect is uttered by the judges who decided in favor of the Crown. That opinion, however, is earnestly combated in this appeal.

That the word *comptables* is a technical term of French law, denoting officers who receive and are accountable for the King's revenues, has been abundantly shown from the law treatises cited at the bar. It has not been shown that in legal documents the word is ever used in the general sense of "debtor" or "person responsible." It stands in the Code as it is likely a term of art would stand, as a noun substantive, which explains itself to lawyers by itself, and does not require the addition of any explanatory words, such as in the English version are found necessary because there is no corresponding English substantive. The draftsmen of the Code were working on the existing basis of French law. They were in the main mapping out a system of French law. It would be a marvellous thing indeed if persons so engaged were to use a technical term with a definite meaning well known to French lawyers, and precisely adapted to the position it occupies in the Code, and yet should intend to use it in some other sense, which is not its technical sense, for which it is not shown to be ever used, and for which other words are used.

Even the general dictionaries, five or six of which their Lordships have consulted, do not lend any countenance to the respondent's argument.

The *Académie* first speaks of the word as a noun adjective thus:—"Qui est assujetti à rendre compte; officier; agent comptable; les receveurs sont comptables. Je ne veux point de place d'emploi comptable," which Tarver translates, "I don't want a place where accounts are kept."

As a substantive it is said to be thus used: "Les comptables sont sujets à être recherchés. C'est un bon comptable," *i. e.*, a good accountant.

Laveaux says very much the same as the *Académie*. Both show that the word is used metaphorically, as "Nous sommes comptables de nos talents."

Littre defines the adjective thus:—"Qui a des comptes à tenir et à rendre, officier, agent comptable;" and he gives the metaphorical use. Of the substantive he says, "Celui qui est tenu de rendre compte de deniers et de son emploi."

Bouillet in his "Dictionary of Commerce," says of the word as a substantive, "Le mot s'applique à toute personne qui est assujettie à rendre compte des affaires qu'elle a gérées."

Coutanseau and Spiers render it in English, "An accountant. A responsible agent."

Their Lordships have not found any trace of its being used in the general sense of a debtor or person under liability except in metaphor.

Tarver and Spiers render "debtor" simply by the word *débiteur*. Coming down to its special use in the instrument now being

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construed, their Lordships have found many passages in the Civil Code where the words *comptable* and *compte* are used strictly of those who are bound to account for particular transactions:

- As of a tutor, art. 308 *et seq.*
- of an *héritier bénéficiaire*, art. 677.
- of an executor, art. 913 *et seq.*
- of a husband for his wife's goods, art. 1425.
- of an agent, art. 1713.
- of partners, art. 1898.

They have not been referred to, and they have not found any passage, in the Civil Code where these words are used to denote generally a debtor or person under liability.

For creditors and debtors the words used are *créanciers* and *débiteurs*, see Tit. III. throughout, and particularly chap. 7.

To express general liability the Code uses such verbs as *Tenir*, *Répondre*, *Charger*, and their inflexions or derivatives.

If there be any difference between the French and English versions, their Lordships think that in a matter which is evidently one of French law, the French version using a French technical term should be the leading one. There might be cases in which such a question would arise. But it does not arise here. The expression "persons accountable for its moneys" is not calculated to convey to the mind of an English lawyer the notion of an ordinary debtor or of a banker. As between a banker and his customers, he, by English law, is an ordinary debtor, and the amount which he owes them is not "their" money, nor is he "accountable" for it in any but a popular sense. Arts. 1778 and 1779 of the Civil Code seem to be founded on the same view. Mr. Justice Ramsay says that to call a debtor accountable to his creditor would be a perversion of language. Their Lordships, without going so far, cannot see why, if the draftsmen of the English version intended to speak of debtors, they should not have used the common term for the purpose. Or rather they would have used no term at all, but would simply have mentioned the claims of the Crown, as they have mentioned the claims of the vendor and the lessor. In fact, the terms used are strong evidence that in this passage the English version is really a translation from the French, and that in translating a French technical term for which there is no English equivalent, the draftsmen have used the best periphrasis they could think of. Their words are quite applicable to a *comptable*, *i. e.*, an officer collecting revenue, bound to earmark the funds, to account for them, and not to use them as his own. Such is the position of an officer under Act 31 Vict., chap. 3, sec. 18, as set out in the Record, p. 63. They may possibly include some other cases, but they are not applicable to a bank receiving money on deposit or current account.

Construing the words according to the technical sense of *comptables*, we come to the last question; which is the construction of art. 611 of the Procedure Code.

In this article, the word "defendant" is used with strict accuracy in reference to the subject matter of the title under which it is found, but must receive a reasonable latitude of construction in applying

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the article to cases where there is no defendant. And it would seem that the words "in the absence of" would require to be read in the meaning of "subject to"; for it can hardly have been meant that the rule was not to apply in any case where there were some special privileges to be answered. When construed in all other respects literally, the article certainly gives to the Crown the priority claimed for it in this suit. But then it comes into conflict with art. 1994 of the Civil Code.

In the first place, by giving to the Crown a priority for all its claims, it swamps the limited priority given by the 10th head of art. 1994, and renders that head unmeaning. But beyond this there is actual inconsistency between the two articles. According to the literal construction of 611, the Crown has priority over funeral expenses, and other classes of debts which by 1994 have priority over the Crown.

It would seem that the majority of the Queen's Bench paid no attention to this conflict. They say they are asked to "set aside" 611 on the ground that it got into the Code in some wrongful way. They were asked to do so, and were quite right in their refusal. But they were also asked to construe the Codes as they stand, and as Mr. Justice Mathieu had done. They do not notice the conflict of 611 with 1994 or the necessity of modifying the construction of one or the other. But the duty of the judge is, if possible, to reconcile the two, and for that purpose to look at all relevant circumstances.

The appellants at the bar have pressed somewhat too absolutely the argument that a Procedure Code is not intended to enact substantive law, and that this part of the Procedure Code is only intended to give directions to the courts how to carry the rules of the Civil Code into effect. Some of the articles of the Procedure Code (*e. g.*, art. 610,) do create or establish rights not touched by the Civil Code. The two Codes should be construed together in this part just as if the articles of the Procedure Code followed the corresponding articles of the Civil Code.

So reading them, we find that the main purpose of this part of the Procedure Code is to carry into detail the principles laid down in the Civil Code, which are repeated in the form of directions how money is to be distributed. And where fresh classes of priorities are established, they are subordinate classes not interfering with the larger classification of the Civil Code. Of course it could be no part of the Procedure Code to contravene the principles of the Civil Code, and it is clear from art. 605 that the two were believed to be working in harmony. And when the Procedure Code is found to overlap the Civil Code, and so it becomes necessary to modify the one or the other, the fact that the function of the Procedure Code is in this part of it a subordinate one favours the conclusion that it is the one to be modified.

That there should have been any deliberate intention of giving large extension of privilege to the Crown by the indirect method of inserting a provision in a group of clauses relating to a judicial distribution of property taken in execution, is a thing highly improb-

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able in itself. And the improbability is much heightened by the fact that at the same instant the legislature was engaged in cutting down throughout Upper Canada the very same privilege which it is held to have been setting up throughout Lower Canada.

The foregoing are their Lordships' reasons for concluding that full effect should be given to art. 1994, and that art. 611 should consequently be modified so as to be read in harmony with the other. There is difficulty about it, as there always is in these cases of inconsistency. Following the rule laid down for their guidance in such cases by section 12 of the Civil Code, their Lordships hold that the meaning of the legislature must have been to speak to the following effect:—"Subject to the special privileges provided for in the Codes, the Crown has such preference over chirographic creditors as is provided in art. 1994." Or adhering as closely as possible to its rather inaccurate language, "In the absence of any special privilege, the Crown has a preference over unprivileged chirographic creditors for sums due to it by the defendant, being a person accountable for its money."

It may be objected that, thus read, the article is only a repetition of what is contained in the Civil Code. That is so, but it will be found that some of this group of articles (art. 607 may be taken as an example), in fixing the rank of recipients of a fund actually under distribution, do contain repetitions of the corresponding articles of the Civil Code which give the same rank in the wider and more abstract form of privileged claims or *créances*. The objection, therefore, is not a serious one, as the repetition results from the principle on which these portions of the two Codes are framed.

This reading is nearly the same as the readings proposed by Mr. Justice Mathieu and Chief Justice Dorion. It is a large modification of the words, but not larger than is required to bring the two sections into harmony. There is ample authority for it in *Carter v. Molson*, and the other cases cited at the bar, and in that of *The Windsor & Annapolis Railway*, 7 App. Ca., p. 178.

The result is, that in the opinion of their Lordships the Court of Queen's Bench ought to have dismissed with costs the appeal from the Superior Court. They will now humbly advise Her Majesty to make such a decree. The respondents, by whom the Crown is represented, will pay the costs of the consolidated appeals.

PRIZES OF WAR

See INTERNATIONAL LAW: *iusdem verbis*.

PROBATE

See EVIDENCE: *probate of wills*.

PROCEDURE

See PRACTICE.

PROMISSORY NOTES

See BILLS OF EXCHANGE.

PROPRIETOR

RIGHT TO QUARRY.

CHRISTIAN V. GIBSON ¹

229. In the Isle of Man every proprietor of an immovable in which there is a quarry has the right, by allowing a compensation to his tenant, to take stone in it for his own use. The non-user for twenty-one years does not deprive a proprietor of this right.

PUBLIC NUISANCE

ABATEMENT.

BROWN V. GUGY ²

230. A public nuisance may be abated, according to the French law, by a public officer under the municipal authority, without proof of special damages.

231. Any person who suffers by the nuisance has also an action of damages and may demand the abatement of the nuisance. These actions are distinct in their object and independent of each other.

LORD KINGSDOWN, p. 363:—The law of *Lower Canada*, as we collect it from the authorities, seems to stand thus: An officer suing on behalf of the public has a right at his own instance, or on the application of any person interested, to call for the demolition of any work erected without licence on the public domain, and he is no more required to prove that the erection has occasioned actual damage to the public than a private person, who complains of a wrongful invasion of his property, is obliged to prove that it has occasioned actual damage to him. But, although such an officer may, if he think proper, take proceedings to abate the nuisance, he is not obliged, nor is it in all cases his duty, to interfere. A case of this kind is put by *Proudhon, Traité du Domaine public, Tome III*, p. 192, No. 820, in a passage cited by Mr. Justice *Aylwin*.....

If the public officer refuses to interfere, an individual who suffers injury is not prejudiced; he has still his *action privée*, by which, he may recover damages for injury already sustained, and the abatement of the cause of such injury for the future. The public and private actions are said to be not only independent of each other, but essentially, distinct in their object. The fact that the place where the work is erected is public property is of course very important in both cases, in regard to the right of the defendant to do what he has done, but it does not, according to the law, as we can collect it from the authorities, supersede the necessity of the plaintiff in a private action proving that he has sustained injury by the work special to himself, and beyond that which is common to the public at large, and this, as we have already stated, the plaintiff in this case has failed to do.

PUBLIC SQUARE

See HIGHWAY.

¹ Isle of Man, 1841 Jan. 7, III Moore 351.

² Lower Canada, 1863 Dec. 8, II Moore N. S. 363.

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COMMERCIAL BANK OF CANADA v. GREAT WESTERN RAILWAY
COMPANY OF CANADA¹

¹ Upper Canada, 1865 July 27, XIII Law Times N. S. 105.

POWERS OF RAILWAY COMPANIES.

was passed giving them the power to borrow money from time to time for maintaining and working their railway, to pledge the lands, tolls and revenues for due payment thereof, and to make bonds or debentures for securing the repayment of any sums so borrowed in certain terms.

Held, that the securities upon which the company had power to borrow were not restricted to bonds or debentures only; that a loan of money already made by the respondents to another company although illegal was rendered valid by the statute; and that the company had the right to apply the funds for the maintaining of the railway of the other company as well as its own.

**JONES V. THE STANSTEAD, SHEFFORD AND CHAMBLY RAILROAD
COMPANY¹**

2. The fact that the respondent company, under its charter, had built a railway bridge across the river Richelieu, and carried passengers over such bridge in connection with the ordinary railway traffic, within the limit within which the Legislature, by a previous charter to appellant, prohibited the erection of a toll-bridge and the carrying of passengers for hire across the Richelieu, did not give rise to an action in favor of appellant *en démolition de nouvel œuvre*, and for an injunction and damages.

3. And assuming that the appellant, by virtue of his previous charter, was entitled to compensation, yet his action failed, inasmuch as the giving notice of readiness to pay compensation was not a condition precedent to the company's right to exercise their powers, and, therefore, the company were not wrong doers, and could not be stopped in their works.

4. When a railway company is granted a privilege by statute, and the same statute imposes penalty for the breach of that privilege, the company has no other remedy when its right is infringed.

SIR MONTAGUE E. SMITH, p. 334: — Their Lordships think it desirable, in order to explain their view of the case, to consider the nature of the appellant's right, and the manner in which it may have been injuriously affected.

The right is not that of an ancient ferry, with the incidents attached to it by the ordinary law, but a privilege created by a Statute, and defined and limited by it. The right, so created, is to build the bridge over the river and to take toll. It is protected to a limited extent, and a limited extent only, by the prohibitions contained in the 10th section. If the remedies provided by this clause had been

¹ Lower Canada, 1872 Jan. 12, VIII Moore N. S. 312.

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co-extensive with the prohibition, and had been all given for the benefit of the appellant himself, it would seem that in such case no action like the present would lie at all, even against a wrong-doer, upon the principle that where a new duty or prohibition is created by statute, and the same statute gives a remedy for the breach by penalty or otherwise, for the benefit of the party grieved, he has no other. (See Lord Campbell's judgment in *Couch v. Steel*, 3 E. & B., 412, 413). In the present case, however, the only remedy which is plainly given to the appellant, is the right to the treble toll, and it is by no means clear that the forty shillings payable for each person, &c., carried, is not a penalty which, by section 14, goes to the crown and the informer. However, it is not necessary now to decide the point whether these remedies exclude the right of action; for their Lordships are not prepared to advise that the action be dismissed on that ground; and whether the right of action be so excluded or not, their Lordships consider that the appellant has a property by virtue of his special Act, which would entitle him to compensation under the provisions of the Railway Acts, if he can show that it has been injuriously affected within the meaning of those provisions—which leads to the consideration of the next question, whether it has been so affected, and if so, in what manner by the Acts of the company?

It has been decided by the House of Lords upon the construction of the English Railway and Land Clauses Acts, that damage caused to property by the authorized use of a railway, after it is made, is not damage resulting from "the construction of the railway," or, "the execution of the works," so as to entitle the sufferers to compensation, and those who have their properties rendered unfit for habitation by vibration or noise, unavoidably caused in the proper use and working of a railway, can neither bring an action for a nuisance, because such use and working are authorised and lawful, nor obtain compensation, because the Statutes have not in terms given it for such damage. (See *Brand v. Hammersmith Railway Company*, Law Rep. 4 H L., 171; *City of Glasgow Union Railway Company v. Hunter*, Law Rep. 2, Scotch Appeals 78.) The provisions of the Canadian General Railway Acts appear to be substantially to the same effect as the English Statutes, so far as regards the points thus decided, and it was contended by the learned counsel for the respondents, that the present case was within the principle of these decisions, on the ground that the injury was not caused by the construction of the bridge, but by its use. Their Lordships would certainly think it right to recognize the high authority of the above decisions in their advice to Her Majesty in any case where the circumstances were the same. But it was contended by the appellant's counsel that the facts of this case were not the same. It was said that, although it may be true that the damage is not complete until the bridge is used for traffic, the injury done in the present case is not merely a nuisance incidentally affecting the enjoyment of property, but the very right of the appellant is directly infringed and disturbed by the competing bridge of the respondents.

To support this view, the recent case of *The Queen v. Cambrian*

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Railway Company, (*Law Reports* 6 Q. B., 422) was cited, where the Court of Queen's Bench held that the owner of a ferry was entitled to compensation from a Railway company for building a bridge which disturbed his custom. In that case the bridge not only carried the railway, but was also a foot-bridge. The distinction between the case cited and those in the House of Lords is certainly fine, and was admitted to be so by the court; because it was not the erection of the bridge, but the use of it, when made, which really disturbed the plaintiff's ferry. Mr. Justice Blackburn so allows when he says, "an action for the disturbance of a ferry would not have lain for merely building a bridge, but would only have lain where special damage was shown, viz., where it was shown that people used it to cross the river instead of using the ferry." The decision of the court seems mainly to rest on the ground that the bridge built for the use of foot passengers, when so used, inevitably disturbed the ferry, and therefore was, in law, an infringement of the right. But although such use as would be made of a foot-bridge might inevitably cause a disturbance of an adjoining ferry, it by no means follows that the use of a railway bridge would do so; on the contrary, cases may be conceived where the railway might be so worked as to cause no loss of custom or disturbance to a ferry.

If, however, it be assumed, according to the appellant's contention, that the case cited from the Court of Queen's Bench was properly distinguished from the decisions in the House of Lords, and that the present case is within the principle of that distinction, their Lordships consider that it is not the construction of the railway bridge, authorised by the Statute, but the use of it, when constructed, for the conveyance of traffic, which injuriously affects the privilege of the appellant, and gives him, if at all, the right to compensation, and that in any view of this case he would have no such right unless he is able to establish loss of custom in fact, by the making and use of the railway.

This, then, being the nature of the claim to compensation, and assuming it could be established in law and in fact, can the appellant treat the bridge as being unlawfully built because he has not been beforehand compensated? This depends upon the construction of the Acts.

The 4th Clause of the "Railway Clauses Consolidation Act" of Lower Canada (14th and 15th Vict., c. 51), gives the general right to compensation. It enacts that the power to take lands for the construction of the railway "is to be exercised subject to the provisions and restrictions of the Act," and that compensation is to be made to the owners of lands so taken, "or injuriously affected by the construction of the railway for the value, and for all damages sustained by reason of such exercise as regards such lands of the powers vested in the company;" the compensation to be ascertained and determined in the manner provided by the Act. By the interpretation clause (7) "lands" are to include all real estate and hereditaments.

The 9th clause, 4th subsection, gives the company power to make the railway upon the lands on the line of it.

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By the 10th clause, subsection 1, a plan is to be prepared of the lands "to be passed over and taken for the railway," and also a book of reference, with names of the owners; and by subsection 4, it is provided that until such plan and book are deposited in manner provided, "the execution of the railway shall not be proceeded with."

Then the 11th clause enacts "that the conveyance of lands, their valuation and the compensation therefor," shall be made in the manner therein mentioned. This procedure provides for a notice to be given by the company to the owner, which, in case no agreement is come to, forms the basis of an arbitration.

The 19th subsection provides that upon payment or tender of the compensation awarded or agreed upon, "the award or agreement shall vest in the company the power forthwith to take possession of the lands, or to exercise the right, or to do the thing for which such compensation shall have been awarded or agreed upon, and, if resistance is offered, a judge may issue a warrant to put the company into possession, and to put down the resistance."

There is also a proviso that such possession may be given, where it is necessary to proceed with the railway, without such award or agreement, upon security being given.

It was contended for the appellant that upon those clauses, and especially subsection 19 of clause 11 the powers of the Act could not be exercised until compensation was made.

Their Lordships consider that this might be so held with regard to the taking lands for making the railway,—a question which does not now arise. But it is a different question whether this is so in the case of lands or easements which are not taken, but only injuriously affected by the railway. It is obvious that cases must frequently occur where injuries may happen subsequently to the building of the railway, and as an unforeseen consequence of the works, such as damage to buildings having a right of support from the adjacent land, appearing only when the excavations for the railway are made, owing to some unknown state of the soil, or injury done to drains, or to rights of passage and communication, and to other non-apparent easements, of which the company may have had no notice. It is not reasonable to suppose that when the Legislature gave powers to the company to make the railway on the lands indicated on their plan, it intended that the company should, in cases like these, be subject to action as wrongdoers, and to the legal liability of having their works stopped, because compensation had not been first made to all persons injuriously affected by the consequences of their operations.

Coming then to the appellant's case, and assuming that he may be able to establish a right which has been injuriously affected, his claim would be founded on this, that his statutable right was disturbed by the railway bridge, carrying passengers and traffic, which would otherwise have crossed the Richelieu by his bridge. It has been already pointed out that this injurious effect does not arise necessarily from the construction of the bridge, but may do so from the use of it; and it is apparent that if the railway had never been completed, or if no disturbance had taken place by its carrying

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traffic, which would have otherwise come to his bridge, the appellant would not have been injuriously affected, or entitled to compensation at all.

The powers of the later Canadian Act (22 Viet. c. 66) appear to be substantially to the same effect as the earlier Act.

The practice under the English Acts has been, that possession of lands be taken until the purchase-money has been paid or secured, but the making compensation for injuriously affecting lands has not been considered to be a condition precedent, so as to leave the company open to actions, if it has not been made.

In the above case cited to support the claim of the appellant, the remedy was not an action, but proceedings by arbitration, under the Compensation Clauses (*Reg. v. Cambrian Railway Company*).

It is true the English Acts differ in some respects from the Canadian Statute, and it was pointed out by the appellant's counsel that the prohibition of the 84th section of the English Lands Clauses Act, is confined in terms to the entry upon lands; and that there is no clause in the Canadian Act, equivalent to the 68th Clause of the English Act, which provides a mode in which compensation when not made by the company, may be enforced.

But it is to be observed, that there are no prohibitory words against entering on lands or exercising the powers of the Act before payment, in the Canadian Act. The words of the 19th subsection are affirmative, that upon payment or tender, the award or agreement shall vest the power in the company. It is not enacted that until this is done the authorised works shall not be executed. It is said that this is implied. But when an implication is made, it should be reasonable; and in construing these Acts, it may properly be made according to the subject-matter. Their Lordships are not now dealing with the lands taken for the railway, but with an interest injuriously affected, if at all, by matters arising subsequent, not only to the taking of the lands, but to the construction of the railway bridge. It is not a reasonable construction of the Statute to imply, as a condition precedent, that compensation must be paid for such consequential injuries before doing the work.

It was contended that no machinery was provided by the Act by which compensation can now be assessed, for it was said that unless the notice mentioned in the 7th subsection of the 11th Clause was given, none of the machinery provided by the act could be put in motion. If this is so, it might afford an argument against the right of the appellant to compensation at all, and it might be inferred from it that cases like the present, depending on the use of the railway, were not contemplated.

But it is obvious, as already pointed out, that there may be many cases of damage to property arising during or after the construction of the railway from the works themselves, which would certainly fall within the general obligation to make compensation imposed on companies by the 4th clause. Their Lordships consider that if in such cases the company did not, on application, take steps to appoint an arbitrator and proceed to arbitration, the claimant might take proceedings by way of mandamus to compel them to give the notice

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provided by the 7th subsection of the 11th clause, or to appoint an arbitrator. In such proceedings the court would determine whether the claimant was entitled to compensation before issuing a peremptory mandamus, as in the case of *Reg. v. The Cambrian Railway Company*.

If the appellant's contention is allowed to prevail, Railway companies would in all cases of possible contingent claims, however doubtful, be obliged to give notices declaring their readiness to pay compensation (in fact admitting the right to it) at the hazard, if they omitted such notices, of being treated as wrongdoers, and of having their works demolished or stopped.

Their Lordships, for the above reasons, have come to the conclusion that this suit cannot be maintained, and they will therefore humbly advise Her Majesty to dismiss the Appeal, and to affirm the Judgments of the Canadian Courts with costs.

RESPONSIBILITY OF RAILWAY COMPANIES.

THE GREAT WESTERN RAILWAY CO. OF
CANADA V. BRAID AND FAWCETT¹

5. The respondents were widows of two men who were killed while travelling in a railway car belonging to and under the control of the appellants. The company was sued by respondents to recover compensation for loss sustained by the deaths of their deceased husbands, in consequence of the want of care and skill of the company in the construction of its railway, and in repairing and maintaining the same.

Held, that a railway company, is bound to construct its works in such a manner as to be capable of resisting all violence of weather which, in the climate through which the line runs, might be expected, though perhaps rarely, to occur. That seeing that the embankment was insufficiently provided with means of resisting a storm, which, though of unusual violence, was not of such a character as might not reasonably have been anticipated, and which, therefore, ought to have been provided against by all reasonable and prudent precautions, the company was liable.

LORD CHELMSFORD, p. 116:—There can be no doubt that when an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *prima facie* evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it.

P. 118:—In the construction of works of a permanent character as a railway, the amount of precaution which ought to be taken to guard against any external violence to which it may be exposed

¹ Upper Canada, 1863 Feb. 7, 1 Moore N. S. 101.

RESPONSIBILITY OF RAILWAY COMPANIES.

cannot be the subject of any precise rule, but must necessarily vary according to the varying local circumstances of each case. The difficulty of extracting any principle from decided cases which may be applied with certainty to questions of this description, is strongly exemplified by two judgments of the Court of Exchequer which were delivered within three weeks of each other: *Withers v. The North Kent Railway Company*, 27 L. J. N. S. Exch. 417; *Ruck v. Williams*, 27 L. J. N. S. Exch. 357

P. 120:—Their Lordships, without attempting to lay down any general rule upon the subject, which would probably be found to be impracticable, think it sufficient for the purpose of their judgment in these cases to say that the railway company ought to have constructed their works in such a manner as to be capable of resisting all the violence of weather which in the climate of Canada might be expected, though perhaps rarely, to occur. Now, the evidence fairly considered shows nothing beyond this in the character and degree of the storm which destroyed the embankment. The night of the accident is described by various witnesses to have been "very severe"; one says it was a "bad night, very bad"; another, in the usual style of exaggeration, that "it was the worst night he ever saw"; it is stated by others that the rain "washed away the bridges and portions of the road"; and two of the plaintiff's witnesses describe the storm, one, as being "a very unusual one," the other "an extraordinary storm." In the whole of this evidence there is nothing more proved than that the night was one of unusual severity, but there is no proof that nothing similar had been experienced before, nor is there anything to lead to a conclusion that it was at all improbable that such a storm might at any time occur. It must also be borne in mind that although the embankment had stood firm for five years, and had possibly not been exposed to any storm of equal violence to that before which it gave way, yet it was evidently not constructed, or at least not maintained, in a manner to enable it to resist any unusual pressure.

LAMBKIN v. THE SOUTH EASTERN RAILWAY COMPANY¹

6. A railway company is responsible for damages suffered by a passenger where the accident is partly due to the negligence of the company's employees.

The jury gave a verdict of \$7000 to an architect who derived a considerable income from his practice, and who had been very seriously injured. The verdict was set aside by the court of Appeal for misdirection and excessive damages, but the Judicial Committee reversed this judgment and held that the damages, in the circumstances, were not excessive, and a new trial should have been refused.

SIR ROBERT P. COLLIER, p. 359: Assuming the jury to have believed the evidence on the part of the plaintiff, their Lordships think

¹ Quebec, 1880 Feb. 3, L. R. V Appeal Cases 352.

RESPONSIBILITY OF RAILWAY COMPANIES.

that they would have been wrong if they had confined the damages, which they had to assess once and for all, solely to what the plaintiff had lost at the time of action brought or at the time of the trial; that it was their duty to take into consideration that the plaintiff had been disabled for twelve months; that he had not then recovered, and that it was doubtful, according to the best evidence, whether he would recover at all, or, if he did recover, when he would recover; and although an estimate of future damages must necessarily be of a somewhat rough and speculative character, still they were bound to give him some damages in respect of the future loss which he would sustain.

The learned Judges appear to have directed a new trial upon the supposition that the jury only gave damages in respect of what the plaintiff had lost at the time either of action brought or of the trial, and that those damages are excessive. Such is the view certainly of Mr Justice Sanborn, who says: "It is impossible that three or four weeks' illness and more or less loss of time for some months of a man who earned four dollars a day could occasion a loss of \$7,000." Their Lordships may observe that Mr. Justice Sanborn seems not to have been quite correct in estimating the loss of the plaintiff as of a mere labourer who earned \$4 a day, inasmuch as the evidence is that the plaintiff not only earned \$4 a day in addition to the profit upon his workmen and materials, but carried on business as a manufacturer. It appears to have been inferred that the jury intended to assess damages only up to the time of the trial, from their answer to one of the questions put to them in the articulation of facts. But their Lordships are by no means satisfied that such was the intention of the jury. They are first asked:—"Has the plaintiff, ever since the said accident, been disabled from doing business, and to what extent is he disabled from attending to business? Answer.—He has been disabled up to the present time;—that is to say, they did not think him cured. Then the question is put, which divides itself into three:—"Is the plaintiff the head of a family composed of his wife and three children? Are they all dependent upon his labour for their maintenance? Have they ever since been deprived of his labour, and to what extent in the future will they be deprived of his labour? Answer.—He is the head of a family consisting of a wife and three children; one, a son, is not dependent; wife and two girls dependent." The answer to the second part of the question is:—"They have been deprived;" and to the third, the jury answer that they cannot form a judgment.

Their Lordships scarcely understand on what principle this question should have been put to the jury. The question in the cause was not what damage had been sustained by the plaintiff's wife and children, but what damage had been sustained by himself. If he had been killed, and such an action as that brought under Lord Campbell's Act in this country could be maintained in Canada, then the question would be what damage was sustained by his wife and children. But the jury are further asked, "To what extent in the future will the wife and children be deprived of his labour?" It had been originally proposed to put the question in the form:—

RESPONSIBILITY OF RAILWAY COMPANIES.

"For what time, under probable circumstances, or in all probability, would they be deprived?" But on the defendants' objection the question stands in its present form, and the jury are required to fix the time when the plaintiff will recover. They declined to do what no witness, medical or otherwise, had attempted, but their Lordships do not therefore infer that when they answer the further question, "Has the plaintiff suffered damages by the said accident, and, if so, to what amount?" they excluded all consideration of future loss. If they had thought that the plaintiff would be disabled for all the rest of his life, in their Lordships' view the damages would be too small; but if they adopted the intermediate view, which seems to be, on the whole, the result of the evidence of the plaintiff's witnesses, medical and otherwise, that the plaintiff had been seriously injured, that he still continued to suffer, that his brain still continued somewhat affected, that he was unable to attend to business, and that it was uncertain whether he would ever recover, although he might recover, their Lordships feel unable to say that the damages given were so excessive as to justify a new trial upon that ground. They observe that the law of Canada, as expressed by the Article 426, section 11, is not far different from that of this country upon this subject: "If the amount awarded be so small or so excessive that it is evident the jury must have been influenced by improper motives, or led into error," then a new trial must be granted. On the whole, their Lordships are by no means satisfied that the damages are of such an excessive character as to show that the jury have been either influenced by improper motives or led into error, and they are of opinion that there ought to be no new trial.

Therefore, their Lordships will humbly advise Her Majesty that the judgment of the Court of Queen's Bench be reversed, that the judgment of the Superior Court of Montreal be affirmed, and that the Appellant have the costs of the Appeal in Canada and of the Appeal to Her Majesty in Council.

See PRINCIPAL AND AGENT: power of delegation.

LIABLE TO SEIZURE.

REDFIELD V. CORPORATION OF WICKHAM¹

7. The provincial Act, 43 and 44 Vict. ch. 49, sect. 11, which provides for the transfer of the South Eastern railway contained a clause to the effect that nothing in the Act shall affect suits then pending. It was held that that clause applies also to proceedings after judgment.

8. Held also, that a railway may be seized and sold by the sheriff as any other immoveable for the debts of the company.

LORD WATSON, p. 744:—In the course of the argument, the appellants maintained that the sheriff's seizure ought to be annulled, and proceedings stayed, on the ground that the railway, assuming it to

¹ Quebec, 1888 Feb. 15, L. R. XIII Appeal Cases 467.

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be the property and in the possession of the company, was not liable to attachment for debts of the company. That plea does not appear to have been taken, or discussed, in either of the Courts below; but, seeing that it involves considerations of public interest, and is sufficiently raised by the proceedings submitted to them, their Lordships conceive that they are bound to dispose of it.

The appellants relied upon the authority of *Gardner v. London Chatham & Dover Railway Co.* (2 Ch. App. 201), and *In re Bishops Waltham Railway Co.* (2 Ch. App. 382). These cases, which were decided by Earl Cairns (then Lord Justice) and Lord Justice Turner, establish conclusively that, in England, the undertaking of a railway company, duly sanctioned by the Legislature, is a going concern, which cannot be broken up or or annihilated by the mortgagees or other creditors of the company. The rule thus settled appears to rest upon these considerations,—that, inasmuch as Parliament has made no provision for the transfer of its statutory powers, privileges, duties, and obligations from a railway corporation to any other person, whether individual or corporate, it would be contrary to the policy of the Legislature, as disclosed in the general Railway Statutes, and in the special Acts incorporating railway companies, to permit creditors of any class to issue execution which would have the effect of destroying the undertaking or of preventing its completion.

A different result was arrived at by the Court of Queen's Bench for Lower Canada in *The Corporation of the County of Drummond v. The South Eastern Railway Co.* (24 L. C. J. 276). In that case the corporation, who were the holders of a bond issued to them by the Richelieu, Drummond & Arthabaska Railway Company, before the amalgamation, obtained judgment against the South Eastern Company, and proceeded to take in execution, with a view to sell, a section of their railway. The Judge of the Superior Court quashed the proceedings, on the ground that the railway of a company incorporated by statute could not be seized in execution of a judgment, or sold at a sheriff's sale; but his decision was reversed by a majority of the Queen's Bench (Tessier, J., *diss.*), who allowed the sale to proceed. Apparently, the Court did not in that case require to consider whether a judicial sale could have been permitted of such part of the railway property as would necessarily have had the effect of breaking up the undertaking, or of resolving it into its original elements. Mr. Justice Cross said (24 L. C. J. 289):—"I can see no serious cause to apprehend that a change of proprietorship would interfere with the obligations which the road owes to the public, and which the general law affecting railroads impose on whomever holds it. Should it pass into the hands of individual proprietors, it is nevertheless to a great extent subject to the general laws enacted for the government, control, and inspection of railways."

These observations strongly suggest that the legislation which the Court of Lower Canada had to consider, in that case, differs in material respects from legislation upon the same matters in this country. The learned judge was speaking, in the year 1879, with

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reference to provincial statutes, which it is now unnecessary to examine, because the undertaking of the South Eastern Company had become a Dominion railway, before the respondent's writ of *Fi.-Fa.* was issued. Sect. 92 (10 c.) of The British North America Act 1867, excludes the authority of provincial legislatures in regard to local works and undertakings which are, before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada. On the 25th of May an Act was passed by the Dominion Parliament (46 Vict., cap. 24) further to amend "The Consolidated Railway Act, 1879," and to declare certain lines of railway to be works for the general advantage of Canada; and the enumeration of these lines in Sect. 6 includes the whole system of the South Eastern Company. Sect. 14 of the same Act provides that "if at any time any railway or any section of a railway be sold under the provisions of any deed or mortgage thereof, or at the instance of the holders of any mortgage bonds or debentures, for the payment of which any charge has been created thereon, or under any other lawful proceeding, and be purchased by any person or corporation not having any corporate powers authorising the holding and operating thereof," the purchaser must, within ten days from the date of his purchase, transmit to the Minister of Railways and Canals an intimation of the fact, describing the termini and line of route of the railway, and specifying the charter under which it has been constructed and operated. Section 15 provides that, until such intimation has been made and all information furnished which the Minister may require, it shall not be lawful for the purchaser to operate the railway; but that he may thereafter continue, until the end of the then next session of the Parliament of Canada to work the railway and to take tolls, upon the terms and conditions of the previous owner's charter, unless these are varied by a letter of license, which the Minister is authorized to grant. Sect. 15 makes it the duty of the purchaser to apply to Parliament, during the next session after the purchase, for an Act of incorporation or other legislative authority to hold, operate, and run the railway. If the application proves unsuccessful, it is in the discretion of the Minister to extend his license until the end of the next following session of Parliament, and no longer. Should the purchaser, during the extended period, fail to obtain an Act of incorporation or other legislative authority, then the railway must be closed, or otherwise dealt with by the Minister of Railways and Canals, as shall be determined by the Railway Committee of the Privy Council.

Comment upon these enactments would be superfluous. They do not suggest that, according to the policy of Canadian law, a statutory railway undertaking can be disintegrated by piecemeal sales at the instance of judgment creditors of incumbrances; but they clearly show that the Dominion Parliament has recognized the rule that a railway or a section of a railway may, as an integer, be taken in execution and sold, like other *immeubles*, in ordinary course of law. They justify the statement of Chief Justice Dorion, in the present case, that, "it is now well settled by the jurisprudence prevailing in this country, and recognized by the Act 46 Vict.,

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"cap. 49, that a railway can be seized and sold for the debts of the company who owns such railway."

TAKING POSSESSION OF LAND.

CORPORATION OF PARKDALE V. WEST.¹

9. An order of the railway committee under 46 Vict. ch. 24 sect. 4 of the Dominion, does not of itself, and without the fulfilment of the formalities imposed by law, authorize a railway company on whom the order is made to take any persons' land or to interfere with any persons' right. And such formalities include all the provisions contained in the Consolidated Railway Act, 1879, under the heading of "plans and surveys," and "lands and their valuation" which are applicable to the case; the taking of land and the interference with rights over land being placed on the same footing in that act.

10. Where a railway company, acting under such an order, did not deposit a plan or book of reference relating to the alterations required by the order, it was not entitled to commence operations.

11. Under the act of 1879, the payment of compensation by the railway company is a condition precedent to its right of interfering with the possession of land or the rights of individuals. *Jones v. Stanstead Railway Company*. L. R. 4 P. C. 98 distinguished.

NORTH SHORE RAILWAY CO. V. PION.²

12. Under the Quebec Railway Consolidation Act, 1880, sect. 9, no authority is given to a railway company to exercise its powers in such a manner as to inflict substantial damage upon land not taken, without compensation.

13. And, as the appellants had not taken the steps necessary under the Act, 1880, to vest in them the power to exercise the right or do the thing for which compensation would have been due under the Act, an action by the respondents for damages and the removal of the obstruction, would lie; in which, if the obstruction were not ordered to be removed, damages as for a permanent injury to the land could be recovered. For their Lordships' remarks, see RIPARIAN PROPRIETORS: *rights of*

The following cases were commented and acted upon by their Lordships, viz: Corporation of Parkdale v. West³, Jones v.

¹ S. C. Canada, 1887 July 27, L. R. XII Appeal Cases 602.

² S. C. Canada, 1889 August 1, L. R. XIV Appeal Cases 612.

³ 12 App. Cas 602.

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*Stanstead Railway Company*¹, *Hammersmith Railway Company v. Brand*², *Queen v. Cambrian Railway Company*³, *Hopkins v. Great Northern Railway Company*⁴.

REDEMPTION

See **HYPOTHEC**: *iisdem verbis*.

RECUSATION

See **PRACTICE**: *eo tem verbo*.

RECONVENTION

See **PRACTICE**: *cross-action*.

REGISTRATION**EFFECT OF**

THE NATAL LAND CO. v. GOOD⁵

14. The duly registered title of a mortgagee prevails over the equitable right of an anterior *bona fide* purchaser without any title registered.

McELLISTER v. BIGGS⁶

15. Under the law of South Australia, a unregistered title to land does not pass interest in the land, but gives an equitable right sufficient to contest a registered certificate of title obtained by fraud.

WHITE v. NEAYLON⁷

16. Under the registration Act of South Australia, priority is given on behalf of a registered title against an unregistered one; but the act does not destroy a claim in equity of which a subsequent purchaser has had notice.

EFFECT OF WRIT OF FIERI FACIAS.

REGISTRAR OF TITLES v. PATERSON⁸

17. Where a copy of a writ of *fieri facias* against a registered proprietor of land, accompanied by a statement specifying the land as that sought to be affected by such writ, has been served on the Registrar of titles, and no transfer upon a sale under such *fieri facias* has been left for entry upon the registrar, within three months from the day on

¹ L. R. 4 P. C. 98.

² L. R. 4 H. L. 171.

³ L. R. 6 Q. B. 422.

⁴ 2 Q. B. D. 224.

⁵ Natal, 1868 July 21, V Moore N. S. 132.

⁶ South Australia, 1883 March 14, L. R. VIII Appeal Cases 314.

⁷ South Australia, 1886 Feb. 9, L. R. XI Appeal Cases 171.

⁸ Victoria, 1876 Dec. 6, L. R. II Appeal Cases 110

EFFECT OF WRIT OF FIERI FACIAS.

which the copy was served, but a copy of an *alias fieri facias*, accompanied by such statement as aforesaid, has been served on the Registrar before the expiration of three months from the service of the copy of the original *fieri facias*, the Registrar cannot, after the expiration of such three months, register a transfer of land from the registered proprietor to a purchaser from him, which had been lodged for registration before the service of the copy of the *alias fieri facias*.

OF MARRIAGE CONTRACT.SIMON V. VERNON ¹

18. The registration of a marriage contract in the public register, pursuant to an order of the Royal court, confers in favour of the wife a right of hypothec, in respect of its provisions, which entitle her to be ranked in the codement as a secured creditor from and after the date of the order of court giving authority to register.

OF SALE.TENNANT ET AL. V. HOWATRON ²

19. Under the Trinidad ordinance a sale of crops actually growing must be registered on pain of nullity.

REPRISE D'INSTANCESee PRACTICE : *iisdem verbis*.**RESIDENCE**

See DOMICILE.

RESPONSIBILITY**FOR ESCAPE OF PRISONERS.**LE BRETON V. AUBIN ³

20. The prison Board in Jersey are not responsible to the detaining creditor for the escape of a prisoner from the gaol, as the appointment of the gaoler is a mere incident of the management of the gaol.

FOR INJURY TO PROPERTY.THE MADRAS RAILWAY COMPANY V. THE ZEMINDAR
OF CARVETINAGARUM ⁴

21. In India, water is stored in tanks which are kept by proprietors of lands and form part of the national system

¹ Jersey, 1883 June 12, L. R. VIII Appeal Cases 542.

² Trinidad, 1888 March 3, L. R. XIII Appeal Cases 489.

³ Jersey, 1855 July 18, X Moore 17.

⁴ Madras, 1874 Aug. 8, XXX Law Times N. S. 770.

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of irrigation, according to ancient custom. One of them having burst and the water which escaped therefrom having carried away the bridge and embankment of the appellant, the Judicial Committee held, that as the accident was caused by an extraordinary flood without negligence on the respondent's part, this latter was not liable.

22. If a person brings and accumulates on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage. *Fletcher v. Rylands*, L. R. 3 H. of L. 330; 19 L. T. Rep. N. S. 220.

23. The principle that a man, in exercising a right which belongs to him may be liable, without negligence, for injury done to another person, has been held inapplicable to rights conferred by statute, and, therefore, a railway company were held not responsible for damage from fire kindled by sparks from their locomotive engine, in the absence of negligence, because they were authorized to use locomotive engines by statute.

24. Where the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence that if damages result from the use of such a thing independently of negligence, the person using it is not responsible." *Vaughan v. The Taff Vale Ry Co.*, 5 H. & N. 679; 2 L. T. Rep. N. S. 394.

25. A waterworks company laying down pipes by a statutory power, were held not liable for damages occasioned by water escaping in consequence of a fire-plug being forced out of its place by a frost of unusual severity. *Blyth v. The Birmingham Waterwork Company*, 25 L. J. 212.

26. A railway company which had not express statutory power to use locomotive engines, was held liable for damage done by fire proceeding from them, though there was no negligence on the part of the company. *Jones v. The Festiniog Ry Co.*, L. Rep. 3 Q. B. 733; 18 L. T. Rep. N. S. 902.

27. Damage caused to property by the authorized use of a railway, after it is made, is not damage resulting from "the construction of the railway, or the execution of the works," so as to entitle the sufferers to compensation, and those who have their properties rendered unfit for habitation by vibration or noise, unavoidably caused by the proper

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use and working of a railway, can neither bring an action for a nuisance, because such use and working are authorized and lawful, nor obtain compensation, because the statutes have not in terms given it for such damage; *Brand v. Hammersmith Railway Company*, L. R. 4 H. L. 1171; *City of Glasgow Union Railway Company v. Hunter*, L. R. 2 Scotch Appeals 78.

See AFFREIGHTMENT, ARCHITECT AND CONTRACTOR, BANKS AND BANKING, CARRIER, CORPORATION (MUNICIPAL), DAMAGES, JUDGES, MASTER AND SERVANT, MERCHANT SHIPPING, OFFICERS, PARTNERSHIP, RAILWAY, SALVAGE, SHERIFF, TESTAMENTARY-EXECUTORS.

RESPONDENTIA.

See BOTTOMRY AND RESPONDENTIA.

RIPARIAN PROPRIETORS**RIGHTS OF**

MINER V. GILMOUR¹

28. Where a party purchased a piece of land with the right to use the water of a river, subject to a preference in favour of a mill thereabout to be built by the vendor, and which preference was to be exercised in a particular mode, such purchaser is not bound by its exercise in a different mode, and in favour of a different mill.

29. The purchase of the right to the use of a portion of the water of a river cannot prevent a subsequent purchaser from the same vendor of another portion, from diverting the water by virtue of a right which existed prior to the first purchase.

LORD KINGSDOWN, p. 155:—The law upon the subject, which is the French law prevailing in Lower Canada, was examined and discussed by the counsel at the bar, in the course of two arguments which their Lordships found it expedient to require, with great learning and ingenuity. It did not appear that, for the purposes of this case, any material distinction exists between the French and the English law.

By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be

¹ Lower Canada, 1858 Dec. 2, XII Moore 131.

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deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may draw up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury.

LORD V. THE COMMISSIONERS FOR THE CITY OF SYDNEY.¹

80. A grant from the crown of land bounded by a creek, passed the soil of the creek *usque ad medium filum aquæ*, if the description of boundaries in the grant did not exclude from it that portion of the creek, which by the general presumption of law, would go along with the ownership of the land on the banks of it. But a right to the use of flowing water does not necessarily depend upon the ownership of the soil covered by such water.

RANESHUR PERSHAD NARAIN SINGH V. KOONG BEHARI PATTUK.²

31. On natural and artificial water courses:

SIR MONTAGUE E. SMITH, 126: —There is no doubt that the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is, *prima facie*, entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin.

BELL V. CORPORATION OF QUEBEC.³

32. Under the French law, a riparian proprietor has a "*droit d'accès et de sortie*" on the river just as to a house in a street, which, if interfered with, would at once give the proprietor a right of action; but, this right does not give an action of damage to a riparian proprietor, who has suffered no actual and special damage, and who can only complain of obstruction to the navigation in front of his property without interference with his going in or out.

¹ New South Wales, 1859 Feb. 7, XII Moore 473.

² Bengal, 1878 Dec. 3, L. R. IV Appeal Cases 121.

³ Quebec, 1879 Nov. 22, L. R. V Appeal Cases 84.

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SIR MONTAGUE E. SMITH, p. 92:—The decision in this case is to be governed by the French law, as it prevails in the province of Quebec.

In the authorities referred to by the judges below, and those cited at their Lordship's bar, the subject of navigable rivers is discussed principally with a view to determine the question whether a particular river is or is not to be considered the domain of the Crown. The definitions attempted to be given are often vague, and sometimes contradictory.

Their Lordships, after citing Dalloz Rep., Tit. *Voierie par eau*, Nos. 39, 52 and 53, and Daviel, *Traité des cours d'eau*, 1 vol., No. 36, p. 34, continue:

These general definitions of Daviel and Dalloz show that the question to be decided is, as from its nature it must be, one of fact in the particular case, namely, whether and how far the river can be practically employed for purpose of traffic. The French authorities evidently point to the possibility at least of the use of the river for transport in some practical and profitable way, as being the test of navigability.

Their Lordships, assisted in their appreciation of the evidence by the findings of the learned judges below, are disposed to think the result of it to be, that the river is navigable for boats, flats, and rafts, and that it is possible, at the exceptionally high tides referred to, to float barges as high as Scott's Bridge, but that the difficulties and risks which from natural causes attend the navigation of craft of this description are so great that the river in its present state does not admit of their use in a practical and profitable manner.

Turning to the question of damage, and supposing the river to be navigable in the degree just indicated, their Lordships are not disposed to dissent from the conclusion of the two courts below, that the plaintiff has not sustained damage by the construction of the bridge.

It is not disputed that small boats, flats and rafts can be navigated as before unobstructed by the bridge. The interruption complained of is that masted barges cannot pass it without lowering their masts.

It has been already said that the plaintiff's land is used as a farm, and there is no evidence that its occupiers ever employed barges for the purposes of the farm. No produce has been carried from it, and no manure or other things brought to it by such vessels. It does not even appear that in the few instances in which Messrs. Bell are shown to have brought up clay for their potteries it was landed upon this farm. The barges were on one or two occasions brought into a little creek, part of which adjoins the farm, but the clay appears to have been discharged at the corporation road, which is outside it.

It is evident that the plaintiff did not prove that he had sustained damage from actual interruption of traffic. This was scarcely denied, but it was contended that his farm was depreciated in value by reason of the bridge. Upon this question there was a great conflict of testimony. The witnesses for the plaintiff formed their

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opinion in great measure on speculations of future changes in the use and employment of the property, and of artificial improvements which might be made in the river. This latter speculation cannot legitimately be imported into the consideration of the question. With regard to the plaintiff's witnesses generally, the courts below obviously distrusted their evidence, and refused assent to their opinions. These witnesses failed to satisfy them that this farm, which has apparently no landing place, and whose owners had never used the river as a means of transport for conveying anything to or from it, was, having regard to the state of navigability of the river above described, really depreciated in value by the fact that masted barges would have to lower their masts to pass under the bridge.

Their Lordships understand the learned judge of the Superior court to base his judgment on the ground that no appreciable damage has been or would be caused to the plaintiff's property by the construction of the bridge, and that judgment the Court of Queen's Bench has affirmed without altering the *considérants* on which it is founded. This tribunal usually accepts the concurrent findings of two courts upon questions of fact, and their Lordships cannot say that sufficient reasons appear in the present case to warrant a departure from their rule.

The main contention, however, of the appellant's counsel has been that, the river being, however imperfectly, navigable, the appellant has a private right, belonging to him as riparian proprietor, to the free use and navigation of the river, independently of his right as one of the public, and that the construction of the bridge is an infringement of that right, which entitles him to maintain an action without proof of actual, and still less of special and peculiar damage.

A case from Lower Canada, presenting this question, and not unlike in its circumstances to the present, came before the committee some years ago, *Brown v. Guggy*. (This case is reported, 14 L. C. R., 213.)

After reciting some passages of the judgment in the case *Brown v. Guggy*, their Lordships add:

In these passages the distinction between the *action privée*, founded on a right of property which lies, if the right be invaded, without proof of damage, and the same action which arises only when the party is able to prove damage "special to himself," is plainly assumed to exist in the law of Canada, and to apply to cases analogous to that now under appeal. In the cited case, no doubt, the alleged obstruction was negatived, but the judgment is material for the view it presents of the law on the point now under discussion.

There appears to be a clear distinction in French law between rights of immediate access from a man's property to a highway, and the power to complain of a mere obstruction in it.

Reference is here made to the case of *Drummond v. The Corporation of Montreal*, reported 18 L. C. Jurist, p. 225. After reciting a portion of the judgment in that case, their Lordships continue:

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These principles appear to be applicable to the position of riparian proprietors upon a navigable river. There may be "*droit d'accès et de sortie*" belonging to riparian land, which, if interfered with, would at once give the proprietor a right of action, but this right appears to be confined to what it is expressed to be, "*accès*," or the power of getting from the water way to and upon the land (and the converse) in a free and uninterrupted manner. Their Lordships think that this right has not, in fact, been violated in this case; and that, supposing the bridge to cause some obstructions to the navigation, the courts below are right in holding that the plaintiff is not entitled to maintain the action in respect of it without proof of actual and special damage.

The learned counsel for the appellant, in support of their contention on this point, did not at all refer to French or Canadian authorities, but referred only to English and American decisions. These, though they may illustrate the subject, cannot be treated as governing authorities upon the law of the province.

The principal cases cited were, *Beckett v. Midland Ry. Co.*, *L. R.*, 3 *C. P.*, 82; *Metropolitan Board of Works v. McCarthy*, *L. R.*, 7 *E. & I. Appeals*, 243; and *Lyon v. Fishmongers Company*, *L. R.*, 1 *Appeal cases*, 662.

In the first case in the common pleas the railway company had made an embankment in a public road in front of the plaintiff's house, by which the width of the road was considerably diminished, and the immediate access to his house interfered with. It was found as a fact that the house was thereby permanently injured in value. The Court held that the special damage sustained by the plaintiff beyond that of the rest of the public gave him a right of action, and consequently a right to compensation. The Court, however, evidently thought that it was necessary for the plaintiff to prove special damage, so that this case, even in English law, is beside the point now under discussion.

In the *Metropolitan Board of Works v. McCarthy*, the facts were that the plaintiff was possessor of land, on which he carried on trade, situate very near a draw dock in the Thames. This dock which was much used by the plaintiff for the purpose of his business was wholly stopped up and destroyed by an embankment constructed by the board, and the value of the land was thereby undoubtedly diminished. The House of Lords affirmed the judgments of the Court of Common Pleas and Exchequer Chamber given in favor of the plaintiff. The plaintiff was not strictly a riparian proprietor, and the decision again turned on the ground that the plaintiff had sustained actual damage beyond that of the rest of the public. In this case the proximity of the plaintiff's property to the dock was regarded; and no doubt the proximity of property to the highway must usually be a material element in the consideration of the question whether actual damage has in fact been caused to it by the obstruction.

In the *Caledonian Railway Company v. Ogilvy*, 2 *Scotch Appeals*, 229, the House of Lords decided that the mere proximity of the claimant's house to the highway and to the obstruction did not create a particular damage which would give him a right of action.

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There the highway, which was the road by which the plaintiff's house was approached, was obstructed by the railway being made to cross it on a level within a few yards of his lodge and entrance gate. This level crossing, though it undoubtedly created an obstruction very close to the entrance gate, which rendered the use of the road by those occupying the house constantly liable to interruption and delay, did not affect the immediate access to it. and it was held that the claimant had not proved that he had sustained particular damage beyond that of the rest of the public, and his claim was dismissed.

The case most relied on by the appellant's counsel was *Lyon v. The Fishmongers' Company* in the House of Lords. There the plaintiff was owner of a wharf on the Thames. One of its sides abutted on a tidal inlet which allowed of barges being brought up to and loaded and unloaded from and upon that side of the wharf. Under a license from the Conservators of the Thames, the defendants made an embankment fronting the river which entirely filled up the mouth of the inlet, and consequently prevented all access from it to the plaintiff's wharf. The Act of Parliament which empowered the conservators to grant the license contained a saving of the rights of owners of lands on the banks of the river. The question to be decided was, whether the right of access from the inlet to the wharf was a private right which fell within this saving, and the house, overruling the decision of the lords justices, held that it was. The learned counsel sought to press the authority of this case beyond the point which arose for adjudication, and treated it as an authority for the proposition that every riparian proprietor, as such, has, beyond his right as one of the public, a right to the use of the river in a free and uninterrupted manner, so that any obstruction placed in it would be an invasion of a private right, for which an action would lie, without proof of special or even of actual damage. It would obviously be very difficult to assign the limits of such a right, if it were established, especially in large rivers. Upon consideration of the opinions of the learned Lords, it does not seem to this Committee that their decision can be pressed to this extent. The distinction between the right of access from the river to a riparian frontage and the right of navigation when upon it is more than once adverted to, particularly by the Lord Chancellor, who referred, certainly not with disapproval, to the judgment of Lord Hatherley, when Vice Chancellor, in the case of the *Attorney General v. The Conservators of the Thames*, 1 H. and M. 1, where that distinction is pointedly taken and acted upon. Whether an obstruction amounts to an interference with the access to the frontage would be a question of fact to be determined by the circumstances of each particular case. When this access is not interrupted, and the waterway of the river is open to the riparian land, the question will arise for decision whether the right of action of the riparian proprietor for a distant obstruction in the river can be based on higher or other ground than would be that of any one of the public using the river and sustaining special damage; although his being such proprietor would obviously be an important element in the question whether such damage had in fact been sustained.

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The House of Lords undoubtedly decided that the right of access to the waterway from riparian land is a private right which the owner of such land enjoys *qua* owner. Such a right is analogous to the "*droits d'accès et de sortie*" recognized by the French law. If, as it was contended, the English law attributes larger rights than these to riparian proprietors on navigable rivers, it would seem to go further in this direction than the law of Canada, according to which the case now under appeal has to be determined.

Their Lordships, considering that the bridge in question does not in fact interfere with the access to the plaintiff's land, and therefore, that by the law of Canada it was necessary for the plaintiff to prove actual and special damage arising from it, and not disagreeing with the concurrent judgments of the courts below that no such damage has been established, are of opinion that those judgments ought to be affirmed, and they will humbly advise Her Majesty accordingly.

The appellant must pay the costs of this appeal.

COMMISSIONER OF FRENCH HOEK V. HUGO.¹

33. A riparian proprietor has no right to divert the water running in two springs, if in doing so the proprietor on the other side of the spring would sustain a sensible injury. And this latter is entitled to an injunction against the former to make him cease to interfere with the water. English, French and Dutch laws are similar on this matter.

Miner v. Gilmour, 12 Moo P. C. 131, *Vana Breda v. Silberhaner*, 22 L. T. Rep. N. S. 667; *L. Rep.* 3 P. C. 84.

NORTH SHORE RAILWAY CO. V. PION²

34. The appellants made a railway upon the foreshore of a navigable river, by means of an embankment extending along the entire length of the respondents' frontage, cutting off all access to the water from the respondents' land except through one opening left in the embankment and another opening just outside the respondents' boundary.

The Judicial Committee held, that, by the French law, the respondents, as riparian owners, had the same rights of *accès et sortie* as they would have had if the river had not been navigable; that the above obstruction to such rights without parliamentary authority was an actionable wrong; and that the substituted openings above-mentioned were no answer to a claim for indemnity.

EARL SELBORNE, p. 619:—The appellants in this case are a Canadian railway company, against whom an action was brought by the respondents, tanners at Quebec, in October, 1883. The respondents

1 Cape of Good Hope, 1886 March 27, LIX Law Times N. S. 93.

2 S. C. Canada, 1889 August 1, Appeal Cases 612.

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carried on their business upon riparian land belonging to them, which had a frontage of considerable length to the St. Charles, a tidal navigable river within the limits of the harbor of Quebec. The appellants, in 1883, made their railway upon the foreshore of that river, by means of an embankment, extending along the entire length of the respondents' frontage, not, however, taking any part of the respondents' land; and in this embankment they left one opening, 15 feet wide and 12 or 13 feet high, opposite to the tannery, through which the river was accessible at low tides and at some (but not all) high tides. With that exception, they cut off all access to the water from the respondents' land, which, before those works were executed, was always accessible for boats at high water along its whole frontage. The appellants also made another opening, just outside the boundary of the respondents' land opposite to the end of a public street, through which the respondents might, except at certain high tides, have found access by means of that street to the water. No compensation or indemnity was paid or offered by the appellants to the respondents; who brought their action, complaining that they had been unlawfully shut out from their access to the river, and asking for damages, and that the company might be compelled to demolish and remove the obstruction.

On the 26th of March, 1885, Mr. Justice Casault, of the Superior Court of Lower Canada, gave judgment for the plaintiffs, not ordering the demolition or removal of the railway company's works, but giving \$5,500 as damages for the permanent deterioration and diminution in value of the plaintiffs' land, independently of the trade carried on upon it. On appeal, the Court of Queen's Bench for Lower Canada, by a majority of four out of five judges, reversed that judgment. The grounds of reversal, as stated on the face of the order, were: that the company had not taken any part of the plaintiffs' land, nor caused it any physical damage ("*dommage matériel*"), but "had only by constructing their railway between the plaintiffs' property and the river, deprived them of the power, which they had previously had, of communicating freely with the river, and of the advantages of the navigation for the purposes of their business; and that this power of access to the river was not an exclusive advantage, but on the contrary, might be exercised by all the Queen's subjects, and conferred upon the plaintiffs no more than indirect advantages, without giving them the right to an indemnity for the loss of those advantages."

The plaintiffs appealed to the Supreme Court of Canada, which, on the 20th of June, 1887 (also by a majority of four out of five judges), reversed the judgment of the Court of Queen's Bench, and restored and affirmed that of the Superior Court of Lower Canada. The present appeal to Her Majesty in council is from that judgment.

It appears clear to their Lordships that the judgment of the Court of Queen's Bench, which the Supreme Court reversed, could not be maintained upon the grounds assigned for it, unless the rights which belong by the law of Lower Canada to the owners of riparian lands, on the banks of a river which is not navigable, are denied to them when the river is (as in this case) navigable and tidal. Unless that

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proposition can be established, what was said by Lord Cairns in the case of *Lyon v. Fishmongers Co.* (1 App. Ca. 671) must be as true and as applicable in Quebec as in England. Distinguishing the public right of navigation from the rights belonging to the owner of the riparian land, as such, His Lordship said: "When this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place, and it becomes a form of enjoyment of the land and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action or restrained by an injunction."

In the view of their Lordships, this case raises for decision two, and only two, substantial questions; first, whether the land of the respondents (plaintiffs below) has suffered, by the execution of the railway company's works, any such damage or injury as to make an indemnity due to them from the company; and, secondly, whether the respondents have taken the proper course for obtaining that indemnity, if it is their right. In their Lordships' judgment, the first of those questions must, upon the facts, be answered in the respondents' favor, unless it can be made out that by reason of some distinction, in the law of Lower Canada, between navigable or tidal and non-navigable rivers, they had not those rights as riparian owners in the *locus in quo*, which they would have had if the river had not been navigable. Upon this point their Lordships consider that the burden of proof was upon the appellants; the Supreme Court has held the contrary; and their Lordships could not advise Her Majesty to reverse the judgment of that Court, unless satisfied that it was erroneous.

In *Miner v. Gilmour* (12 Moore, 157), this tribunal determined, after two arguments (in 1858), that with respect to riparian rights (in that case the river was not tidal or navigable), there was "no material distinction between the law of Lower Canada and the law of England."

Lord Kingsdown delivering the judgment of the Committee, said:—"By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes, and for his cattle; but, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him."

The question, whether this general law was, in England, applicable to navigable and tidal rivers arose, and (with the qualification only that the public right of navigation must not be obstructed or interfered with) was decided in the affirmative by the House of Lords, in *Lyon v. Fishmongers Co.* (1 App. Ca. 671). That decision was arrived at, not upon English authorities only, but on grounds of reason and principle, which (if sound, as their Lordships think them) must be applicable to every country in which the same gene-

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ral law of riparian rights prevails, unless excluded by some positive rule or binding authority of the *lex loci*. The reasons assigned by Chief Justice Dorion in the Court of Queen's Bench, for the judgment of that Court, were not addressed to any distinction in principle between riparian rights on the banks of navigable or tidal, and on those of non-navigable rivers, but they treated the complaint as if it turned upon a claim to use, not the plaintiffs' riparian land, but the beach or foreshore belonging to the Crown, for access to the river. If this had been so, and if the plaintiffs' land had been at all times divided from the river by a dry beach or foreshore in the nature of a public highway, open to all the Queen's subjects, the same question might have arisen here, which was considered and determined in England in the case of the *Metropolitan Board of Works v. McCarthy* (7 Eng. & Ir. App., p. 243). But that is not the state of facts with which their Lordships have to deal. The *grève*, or foreshore, is not mentioned in the plaintiffs' declaration, which alleges an obstruction of the plaintiffs' access to "the river St. Charles," and the construction of a *quai*, about 15 feet high, completely shutting off the plaintiffs' access to the said "river;" and that the plaintiffs' access from their property to the "said river" had been rendered impossible. The fact being established by the evidence, that the plaintiffs' bank was always accessible with boats at high water, what was said in *Lyon v. Fishmongers' Co.* (1 App. Ca. 683), is equally applicable here:—"It is true that the bank of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of the stream; but it is in such contact, for a great part of every day, in the ordinary and regular course of nature, which is an amply sufficient foundation for a natural riparian right."

The only ground of distinction suggested between a non-navigable river (such as that in *Miner v. Gilmour*) and a navigable or tidal river, forming at high water the boundary of riparian land, was that in the case of a non-navigable river the riparian owner is proprietor of the bed of the river, *ad medium filum aquæ*, which, in the case of a non-navigable river such as the St. Charles, belongs to the Crown. The same distinction was contended for in *Lyon v. Fishmongers' Company*; but the House of Lords, on grounds with which their Lordships concur, thought it immaterial. Lord Cairns rejected the proposition that the right of a riparian owner to the use of the stream depends on ownership of the soil of the stream; he adopted the words of Lord Wensleydale in *Chasemore v. Richard* (7 H. L. 372);—"The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has now been settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturæ*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality,

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"and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state."

It was said in the same case of *Lyon v. Fishmongers' Company*, p. 683: "It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good, *jure nature*, as vertical; and not only the word 'riparian,' but the best authorities, such as *Miner v. Gilmour*, and the passage which one of your Lordships has read from Lord Wensleydale's judgment in *Chasemore v. Richards*, state the doctrine in terms which point to lateral contact rather than vertical." This is followed by the words already cited as to its being sufficient that this contact should exist daily, in the ordinary and regular course of nature, though it may not continue during the whole of any day.

Their Lordships have considered the authorities referred to in support of this part of the appellants' argument, and they are of opinion that none of them tend to establish the non-existence of riparian rights upon navigable or tidal rivers in Lower Canada, or to show that the obstruction of such rights, without Parliamentary authority, would not be an actionable wrong, or that, if in a case like the present, the riparian owner would be entitled to indemnity, under a statute authorizing the works on condition of indemnity, the substituted access by openings, such as those which the appellants in this case have left, would be an answer to the claim for indemnity. The French law prevailing in Lower Canada recognizes generally, in cases of this nature, the right of *accès* and *sortie*; and under that law any substantial obstruction of it, by persons in other respects authorized, would give (*prima facie*) a right to indemnity. The only authorities relied upon by the appellants to which their Lordships think it necessary now to refer, are two Lower Canada cases, the *Queen v. Baird* (4 L. C. R. p. 325), and *Starnes v. Molson* (M. L. R., 1 Q. B. pp. 425-431), and a modern French case *in re Joanne Rousseray*, quoted from the second part of Sirey's Decisions of the Imperial Court in 1865.

In the *Queen v. Baird* there was upon the facts, as proved, no question of riparian right, or of any obstruction of access to the river. The dispute related to land which the nuns of a certain religious house at Quebec had reclaimed from the foreshore of the river, so that the water ceased to flow over it (4 L. C. R., p. 339), and to which the Crown had afterwards established its title. The only question was whether the Crown could grant it to other persons, without giving that religious house a right of preference or pre-emption, and this question was determined in favour of the Crown. In the grant actually made, there was a condition, reserving free access to the inhabitants there, and to the public generally, to pass and repass at all times over the wharves and roads. That case throws no light upon the present controversy.

In *Starnes v. Molson* (M. L. R., 1 Q. B. 425, decided in 1885) riparian land fronting on the River St. Lawrence was taken by a railway company, and a separate sum was assessed as indemnity for

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the loss of the river frontage belonging to that land. This the Court held to be wrong, on the ground, apparently, that nothing ought to have been valued, except the land taken to which that frontage belonged. It is not clear to their Lordships that the Court, in that case, meant to determine that the land ought to have been valued as if it had no frontage to the River St. Lawrence, or as if it possessed no riparian right. If the decision ought to be regarded as having any such consequence, their Lordships could not hold themselves bound by it upon the present appeal.

See SEA COAST : property of rocks on

USE OF BEACHES.

*INCE V. THORBURN.*¹

35. Under the regulation made by the Superintendent of Trade in China, 1854, art. 5, the public has a right to use beach ground, that is the sides of the rivers, according to usage in each district, namely, to have access to the rivers, to beach boats and other thing of that nature. The owners of the land must respect these uses, and erect no building thereon.

RIVERS**USE OF**

*CALDWELL V. MCLAREN*²

36. The right conferred upon owners of higher lands to float timber and logs down streams by the Ontario Statute, 12 Vict., ch. 87, s. 5, is not limited to such streams as are in their natural state, without improvements, but extends to the user without compensation of all improvements upon such streams, even when such streams have been rendered floatable thereby.

LORD BLACKBURN, p. 404 :—The defendant has always been ready and willing to pay for the use of improvements ; that is obviously fair and just, but it is not pretended that the statutes provide in terms that if he uses such improvements he shall pay for them. Had either of them done so, the intention of the Legislature to authorize him to pass over the obstacle by means of the improvement would have been quite clear. The absence of any such provision is strongly relied on as showing that the Legislature did not so intend.

The plaintiff relies on his common law right, as owner of the soil, to prevent any one from using his soil in any way which he does not choose to allow, unless, by statute, that right is abridged, as it may be.

There has been a considerable diversity of opinion amongst the Judges in the courts below. Their Lordships have perused their opinions with much advantage and have with great care considered the reasons of those from whom they differ. In the result they

¹ S. C. China and Japan, 1886 Feb. 24, L. R. XI Appeal Cases 180.

² S. C. Canada, 1884 April 7, L. R. IX Appeal Cases 392.

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come to the conclusion that the judgment of the Court of Appeal for Ontario is right and should be restored.

They think that there can be no doubt that by the law of England the owner of the soil on both sides of a running stream, whether it be navigable or not, is *prima facie* at least, owner of the soil which forms the bed of the stream, and as owner of his land covered by water, has all the rights of a landowner. But this is subject to all rights of the owners above him to have the water flow away from their land, and to all rights of the owners below him to have the flow to come down to them as it was wont. It is also subject to any rights which the public have over it.

One of the practically most important rights of the owner of a portion of the soil of the river is the right to use the water for a mill, and in order to do so, or indeed for any other lawful purpose, to erect a dam on it. The public may have rights to navigate the stream, and whenever such a right exists the right of the mill-owner and the right of the public come into conflict. They may co-exist, but when they do, one or other must be modified.

The rights of the public to navigate a stream may be created either by prescription or by dedication by the owner of the land within time of legal memory. And in an old settled country like England it could seldom be material to enquire further than as to those modes of creating such a right. But when the law of England was taken out to a new, unsettled country where prescription could not exist, and dedication could rarely exist till after the country was to some extent settled, it became important to enquire whether the principles of the common law did not give such a right independent of any user, wherever the stream was, in its nature, capable of being navigated. No question arises in the present case as to this right of navigation; and, at all events, up to a period later than 1849, it was a question of great doubt what the law of Upper-Canada was on this subject. The right now claimed to use streams, not navigable for general purposes, to float down timber, was one, which in England, if it existed at all from the nature of the country, could not be important; it never came into question in any case of which we are aware. It was one which, in a new wild country overgrown with timber might be very important, and it must be a question of doubt what was the right.

The owner of the land covered with water, over which a stream flows, has the unquestioned right to erect a mill on it, if he does not thereby infringe on any right of the proprietors above or below him, or on the public rights. The doubts as to what was the extent of the public right over such streams cast a doubt on the extent to which it was lawful to erect mill dams.

This enactment, it is to be observed, became law in 1849, and has not been altered since. In 1813, the case of *Boale v. Dickson*, was decided in the Court of Common Pleas of Upper Canada. The question there was to a claim for the use and occupation of a slide on the Indian River. The Court of Common Pleas thought that if the slide was on a stream within the meaning of the enactment their Lordships are now considering, the plaintiff must fail; whether, if the

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the statute applies, this consequence would follow, their Lordships need not stop to enquire. So thinking, the Court of Common Pleas put a construction on the Act.

The Vice-Chancellor, in the present case, after the evidence was heard, said, addressing the defendant's counsel:—

"I think, Mr. Bethune, you stated that if I considered myself bound by the authority of *Boale v. Dickson*, there was little use in arguing the case. It seems to me that I am bound by that case in this respect, that I ought to be bound by and respect the ruling of a Court of co-ordinate jurisdiction, though not in the same sense as I would be bound to follow a judgment of the Court of Appeal. If the interpretation placed upon it in *Boale v. Dickson* be the construction this statute is to bear in regard to improvements upon rivers and their floatability, I understand that case to determine that if any improvements are necessary to render streams floatable, the statute does not apply, that it does not alter the character of the private streams, and that the owner of the land over which the stream flows has the right to prevent intrusion upon it. It therefore comes to be a question of evidence as to whether the streams mentioned here can be considered floatable without artificial aids."

The Judges of the Court of Appeal for Ontario, all agreed that Vice-Chancellor Proudfoot had correctly apprehended the construction put upon the statute by the Court in *Boale v. Dickson*, and that he could not properly disregard the decision of a Court of co-ordinate jurisdiction, but all four thought that construction wrong; Burton J., though dissenting from his brothers, expressly saying:—

"I quite agree with them in their view of the doctrine laid down in *Boale v. Dickson*, and think there is nothing to warrant the qualified construction placed upon Sect. 15 of the 12th Vict., chap. 87, by the learned judge who delivered the judgment in that case; but I am unable to bring myself to the conclusion that the mere permission or the recognition of the right to float all streams during freshets makes the entire streams *publici juris*, although, in point of fact, many portions of it may be quite impassable, even in times of freshets, for the smallest description of timber or other article of merchandize.

The Judges in the Supreme Court thought that the construction put upon the statute in *Boale v. Dickson* was right and the Chief Justice, Sir W. Ritchie thought, that even if wrong, it ought to be maintained on the ground taken by Lord Ellenborough in *Doe and Otley v. Manning*, 9 East 71, that in questions of conveyancing it was important to adhere to decided cases even if convinced they were originally wrong. The doctrine has often been recognized. The maxim "*Communis error facit jus*" is peculiarly applicable to conveyancing questions. But this is not a question of conveyancing, and their Lordships do not think that there is any ground for saying that *Boale v. Dickson*, if wrong, should be followed.

And their Lordships agree with the Judges in the Court of Appeal for Ontario in thinking that there is nothing to justify any Court in construing the words "all streams" as meaning such

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streams only as are at all places floatable. They do not think that every little rill, not capable of floating even a bulrush, is a stream within the meaning of the Act. But when once it is shown that there is a sufficient body of water above and below the spot where the natural impediment renders the stream at that spot practically unfloatable, it does not make it cease to be a part of the stream in the ordinary sense of the words.

It has been argued that though this might have been the natural meaning of the words, if the enactment had been "that it should be lawful to float sawn timber rafts and craft down all streams in Upper Canada at all seasons," that the legislature here confined the enactment to making it lawful "during the spring, summer and autumn freshets." And that, it is argued, shows an intention to cut down the large words "all streams." Their Lordships do not assent to this argument. Probably the Legislature confined the enactment to the seasons during which lumberers ordinarily ply their trade, thinking it better to leave the rights of all parties at all other seasons untouched. Whatever was their motive, it seems clear, on the construction of the enactment, that if a lumberer claims a right at any other period than during the freshets to float timber along a portion of a stream, he must rest his claim on something else than this enactment. It is not, however, an objection to his right under this enactment to float during freshets, that he may on the same part of the stream be entitled, on other grounds, to float at all times.

Their Lordships do not think that the limitation of the right in the stream to one period of the year prevents that from being a part of the stream which would otherwise, in the ordinary sense of language, be a part of the stream, even if the existence of an impediment there makes it not practically available for the purposes of the lumberer even in freshets. The respondent's construction of the enactment seems to them to require the introduction by implication of some such words as these: "except on such parts of the streams as are, owing to presence of an impediment such as a waterfall, not practically available for the purpose of floating timber, until some improvements are made."

There does not seem to their Lordships to be any sufficient reason for implying this or any similar qualification.

It is quite true that it is not to be presumed that the Legislature interferes with any man's private property without compensation. But if the whole stream is floatable during the freshets it cannot be doubted that the Legislature did mean, with the object of affording facility to lumberers, to carry their timber to market, to say that they should have the right to float down the stream at these seasons without obstruction by the owners of the bed of the river—without paying them anything. If, as seems to be the opinion of Burton, J., the principles of the common law could be worked out so as to give this right, at any rate the Legislature in 1849 did not know this, or mean to declare it. Without declaring what the law then was, they enacted that "from this time, 1849, forward the law shall be as we now enact."

It is, however, quite true that no power is given by the statute

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to make practically floatable spots which are not so in their natural state, and that the Legislature, who must be taken to know that such streams as this Upper Mississippi were likely to exist in the unimproved parts of the country, must have contemplated that, before the right they gave became practically useful, something must be done which would be a trespass if done without the authority of the owner of the soil.

There does not seem to be any great difficulty in holding that, if all that was done was to remove some existing obstruction, as by blowing up by a rock which impeded the passage, and thus putting the bed of the stream into the state in which it would have been if the rock had never existed, a right to float timber down that spot might be exercised, even though the blowing up of the rock could not be justified against the owner of it. There is more difficulty in dealing with the case of a dam maintained by or with the assent of the owner of the soil for the purpose of making the part of the stream practically floatable, which was not so in its natural state. There is certainly no obligation on the person who makes and maintains such a dam to continue to maintain it; if he ceases to do so, it becomes useless, and can only, if at all, be made useful by forming a joint stock company for the purpose of doing so; and if the Court of Commons Pleas in *Boale v. Dickson* were right in thinking that, if the statute applies, a promise to pay slideage for the use and occupation of such works, in consideration that the plaintiff would allow the defendant to use them, should not be enforced, the Legislature have improvidently reduced the inducement to make the stream at such a part practically floatable. But, though this may be so, the question remains whether the words of the Legislature do not express an intention that, when the part of the stream could be used, it should be lawful for all persons to use it.

It does not seem to their Lordships that the private right, which the owner of this spot claims, to monopolize all passage there, is one which the Legislature were likely to regard with favour, and in the earlier legislation they had, without scruple, cast on the owners of "dams legally erected" the obligation, at their own expense, to make such dams passable for lumber; if the law was, (contrary to what is laid down in *Boale v. Dickson*,) that reasonable compensation should be payable for the use and occupation of works maintained for the purpose of rendering the portion of the stream practically useful for floating purposes, there would be no hardship at all; if the Legislature had inserted a provision that such should be the law, there could have been no doubt of their intention. They have not inserted such a provision; but, though that makes the case somewhat difficult, their Lordships do not think it enough to justify what seems to them a somewhat violent departure from the plain meaning of the words.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the Supreme Court should be reversed and that of the Court of Appeal restored. They do not think there is any reason for departing from the general rule that, the costs of the appeal should be borne by the unsuccessful party the respondent.

USE OF

Booth v. Ratté¹

37. A riparian owner is at liberty to construct and attach to his bank a floating wharf and boathouse, the same not being an obstruction to the navigation, and is entitled to maintain an action for damages in respect thereof caused by any unauthorized interference with the flow and purity of the stream.

RIGHTS OF SEIGNIORS OVER UNNAVIGABLE See SEIGNIOR: *idem* *verbis*.

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¹ Ontario, 1889 Feb. 1, L. R. XV Appeal Cases 188.

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SALE

AUCTION

PAGE V. COWASJEE EDULJEE¹

1. The plaintiff alleged in his action that he had bought, at a public auction, the hull of a stranded vessel, sold by the master and purchased by him upon certain conditions appended to the catalogue of sale, and read out at the auction, and that the vendor had appended to the memorandum of purchase which was signed by his agent after the sale, other conditions differing materially from those upon which he had bought. The action was to recover the difference between the original price bid at the auction and the sum realized at a re-sale.

The Judicial Committee held, that there was no other agreement between the parties than the one founded on the conditions read out in the auction room at the sale; and that the plaintiff having sued upon a different contract which did not give a right of re-sale, was not entitled to recover and ought to have been non-suited.

See GAMING AND WAGERING: wages in India.

BOND OF INDEMNITY.

OSBORNE V. EALES²

2. An immoveable property mortgaged to the extent of £3,116 to a third party was sold by the appellant to the respondent for £2000. A bond of indemnity was given by the vendor for £4000 to secure the purchaser against the mortgage and all other claims that might affect the purchaser's right to the real estate sold. The condition of the bond was that it would be void, if within a year, the vendor gave the purchaser possession and good title free from all hypothecs, or returned him £2000 the purchase money. The time elapsed and the vendor neither re-paid the £2000 nor the mortgage, and the bond became absolute.

In a suit by the vendor praying for the cancellation of the bond and offering to repay the £2000, the Judicial Committee held, that the bond became absolute by non fulfilment of the condition within the time agreed.

3. Pending this appeal, the respondent brought an action against the appellant for the full amount of the bond, al-

¹ Ceylon, 1866 Feb. 3, 111 Moore N. S. 499.

² New South Wales, 1862 June 30, 11 Moore N. S. 100.

BOND OF INDEMNITY.

though it exceeded the amount of the purchase money. Judgment was given in his favour for the £4000; and this judgment was confirmed by the Judicial Committee, on the ground that it was a question of law and contract, and not of equity. *II Moore, P. C. N. S. 125.*

BY BROKERS.COWIE V. REMFRY ¹

4. In sales made through the medium of brokers, the contract is based upon the bought and sold notes only; and where they differ materially, the contract is not binding.

THE RIGHT HON. DR LUSHINGTON, p. 248 :—We are of opinion, that it would be exceedingly dangerous to the safety of all mercantile transactions, which so mainly depend upon usage, and the observance of it, if we were to infer from a circumstance of this description, that the purchasers were bound by this sold note alone, contrary to the custom, contrary to the course of the transaction itself, thereby establishing a contract by an act not in itself purporting so to do, and of the consequences of which Mr. Cowie was not apprized, and which no mercantile man could be expected to surmise.

BY TESTAMENTARY EXECUTORS.CARTER V. MOLSON ²

5. Where power is given by a will to two of the executors to sell the immoveable property of the estate, a sale by one of them to the other is null and void.

6. And the registration of the deed of sale in which reference was made to the will, is a sufficient notice to an onerous creditor of the title under which the debtor held the property hypothecated to him.

BENINGFIELD V. BAXTER ³

7. When an executor cannot sue, because his own acts and conduct with reference to the testator's estate are impeached, actions which could be brought by the executor alone, may be taken by an interested party. *Travis v. Milne, 9 Hare, 150.*

8. The purchase of a testator's estate by one of his executors was set aside as fraudulent in a suit by the widow on grounds of equity.

DELIVERY.CUSHING V. DUPUY ⁴

9. Under articles 1472, 1025, 1027 of the *Code Civil*, de-

¹ Calcutta, 1846 Feb. 11, V Moore 232.

² Quebec, 1885 July 4, L. R. X Appeal Cases 664.

³ Natal, 1886 Dec. 7, L. R. XII Appeal Cases 167.

⁴ Quebec, 1880 April 15, L. R. V Appeal Cases 409.

DELIVERY.

livery is not necessary in a contract of sale, and the property in the thing sold passes without it.

10. But a sale without delivery and for a nominal price, especially in a case where the vendor is insolvent, is to be presumed simulated and fraudulent.

SIR MONTAGUE E. SMITH, p. 422 :—The general question was raised, and much discussed in the Courts below, whether delivery or *déplacement* of the thing sold was necessary to pass the property in it. It was contended that the Canadian law which required *déplacement* had been altered in this respect by the Canadian Civil Code, as the French law had been by the Code Napoléon.

Art. 1472 of the Canadian Code is as follows:—

"Sale is a contract by which one party gives a thing to another for a price in money which the latter obliges himself to pay for it. It is perfected by the consent alone of the parties, although the thing sold be not then delivered, subject nevertheless to the provisions contained in Article 1027."

Art. 1025 and 1027, were also referred to.

The question was debated in the Courts below whether, under the law established by these articles, *déplacement* or a change of possession was not still necessary to give the petitioner a title against the assignee in insolvency. Their Lordships, however, do not feel it necessary to determine this question, because, allowing the Appellant's construction of these Articles to the fullest extent, and assuming for the purpose of the present decision that, upon a genuine contract of sale, the property sold would pass to the vendee, as regards not only the vendor, but third persons, without delivery or *déplacement*, they agree with the opinion of Chief Justice Dorion (in which Justices Cross and Tessier concurred) that the transaction in question was not a genuine but a simulated sale, and, if at all real, was a contrivance intended to obtain, under colour of a sale, a security upon the plant and effects, and thus to avoid the delivery of possession which is essential to the validity of a pledge. (*See*, as to pledge, Arts. 1966–1970, Canadian Civil Code.)

PREVOST V. LA COMPAGNIE DE FIVES-LILLE.¹

11. A sheriff's sale of a sugar factory with the fixed machinery therein, as of an immoveable, was made free of all charges. The customs authorities, on the next day, before the purchaser could take possession of what he had bought, acting under a *bref d'assistance*, seized the whole machinery and refused to give or allow delivery until the whole export duties chargeable in respect of the machinery were paid.

Under the circumstances, the claim of the crown, whether well founded or not, having been made under a warrant

¹ Quebec, 1885 July 18, L. R. X Appeal Cases 643.

DELIVERY.

ex facie regular, and the seller being, therefore, effectually prevented from giving possession to the purchaser, the latter was relieved from his obligation to pay the price.

12. Article 712 of the Code of Civil Procedure relates only to dispossessing the judgment debtor, but does not cast upon the purchaser the obligation to pay the price and thereafter get possession from a third party as best he may.

LORD WATSON, p. 649:—Their Lordships are of opinion that neither the judgment of the Queen's Bench, nor that of the Superior Court, which was thereby affirmed, with variations, can be sustained. Both judgments are based upon the ground that, because the seizure by the Crown upon the 29th of August, and the subsequent detention of the machinery until payment should be made of the customs duties, were, in the opinion of the learned Judges, contrary to law, therefore it was in the power of the appellant Prévost, upon payment of the *prix d'adjudication*, to put himself in possession of the property sold to him. That is a very startling proposition. The Crown made the seizure of the machinery, and kept possession of it, in virtue of a warrant *in facie* regular; and in this appeal, as well as before the Court of Queen's Bench, the Attorney General for the Dominion has appeared and pleaded that the Crown acted within its legal right in seizing and detaining the machinery until customs duties to an amount exceeding \$20,000 were paid. The claim of the Crown might or might not be well founded, but nothing in the present case is more clearly apparent than the fact that the claim was deliberately preferred, and has been seriously insisted on, and that the appellant Prévost if he had in September 1882 paid the price of \$76,000 to the sheriff, could not have obtained possession of the property which he had purchased, except by paying some \$20,000 more which he was not bound to do, or by entering into a doubtful and, it might be, protracted litigation with the Crown. The practical result of the judgments in the Courts below is to relieve the seller of any obligation to give delivery of the subjects sold, and to impose upon the purchaser an obligation to pay the price, and thereafter to attain possession, in the best way he can, it may be, after expensive litigation, and years after he has parted with the purchase money. It appears to their Lordships that such a result is inconsistent with the essential principles of the contract of sale, and is not justified by any peculiarity of the Canadian law.

Art. 1491, C. C., declares that, whilst the rules concerning the formalities and proceedings in judicial sales are to be found in the Civil Procedure code, such sales "are subject to the rules generally applicable to the contract of sale, when these are not inconsistent with special laws or any article of this Code." By Art. 1491, C. C., the principal obligations of the seller, arising out of the contract of sale, are defined to be, "1, the delivery, and, 2, the warranty of the thing sold." By Art. 1492 of the same Code, delivery is declared to be "the transfer of a thing sold into the power and possession of the buyer;" whilst the following Article (1493) is to the effect that

DELIVERY.

the obligation of the seller to give delivery is satisfied "when he puts the buyer in actual possession of the thing, or consents to such possession being taken by him, and all hindrances thereto are removed."

These articles of the Civil Code merely lay down certain well known rules as to delivery, incidental to the contract of sale, which are common to most, if not to all systems of jurisprudence, and these rules are not in the least inconsistent with any of the formalities and proceedings prescribed by the Code of Civil Procedure in the case of judicial sales. Upon the completion of the contract, there immediately arise mutual rights and obligations on the part of the seller and the purchaser. When the subject of the sale is an *immeuble*, the obligation of the seller is to give the purchaser peaceable possession, and also a clear title, to enable him to defend his possession, and it is the right of the seller, upon fulfilment of that obligation, to demand and receive payment of the price. On the other hand, the obligation of the purchaser is to pay the price upon delivery of possession and of a title sufficient to protect him from eviction. Neither of the parties can exact performance from the other, except upon the condition of fulfilling his own part of the contract.

It was urged on behalf of the respondent Company that the sale to the appellant was perfected by the adjudication of the sheriff upon the 28th August 1882, and that such adjudication had the legal effect of transferring the property to the appellant, and of giving him, at the same time, an unencumbered title. Now, it is not matter of dispute that the sugar factory buildings and the machinery were sold together as an *immeuble*, and, that being the argument of the respondent Company does not appear to be consistent with Article 706 of the Procedure Code, which declares that "no adjudication is perfect until the price is paid, and then it conveys ownership from the time of its date." But, assuming that the adjudication did pass the property of the thing sold to the purchaser, that would not, in the opinion of their Lordships, relieve the seller from the performance of the legal obligations incumbent upon him, arising out of the completed contract of sale. The respondent's argument upon this part of the case confounded two matters which are essentially distinct, the perfection of the contract and its due performance. If the appellant had bought a mere title there would have been room for the respondent's contention, but the thing exposed to sale by the sheriff and purchased by the appellant was a sugar factory, and the obligation of the seller, under the completed contract of sale and purchase, was to give him actual possession of the factory.

It was also suggested, in the argument for the respondents, that, in the case of a judicial sale, it lay with the purchaser to take judicial proceedings, if these became necessary, for attaining possession of the property sold to him. The suggestion was based on the terms of Article 712 of the Procedure Code, which provides that a purchaser, who cannot obtain delivery of the property sold from the judgment debtor, must demand it of the sheriff, and upon the sheriff's return or certificate of the refusal to deliver, may apply to the Court for an order commanding the sheriff to dispossess the debtor, and to

DELIVERY.

put the purchaser in possession. The remedy thus provided is a summary method of ejecting the judgment debtor, whose right and interest in the property has already been extinguished by a series of regular judicial proceedings. It has no analogy to the case of a preferable claim, such as is here asserted by the Crown, coupled with actual possession by the claimant, under a formal legal warrant.

A claim of that kind, even assuming that it may ultimately prove to be invalid, can only be determined, and possession recovered, by means of a new litigation which may last for years. It would be contrary to well recognized principles of law and equity to hold, and there is no authority to be found, either in the Civil or Procedure Code, for holding that such a hindrance to the purchaser's obtaining possession must, in the case of an ordinary contract of sale, and in the absence of special circumstances, be removed by him, at his own expense, and not by the seller.

Their Lordships do not consider it necessary, for the purposes of this case, to decide any of the questions which have been argued before them, in regard to the right of the Crown, either at common law, or under the provisions of the Dominion Act, 40 Vict., c. 10, to seize and retain possession of the machinery in question. It appears to their Lordships to be quite sufficient for the decision of the case between the original parties to it, that no offer has been made to implement the sale of the 28th August, 1882, by delivering possession to the purchaser; and that, in point of fact, neither the sheriff nor the respondents have ever been in a position enabling them to give delivery to the appellant, in terms of articles 1491, 1492, and 1493 of the Civil Code.

Accordingly their Lordships will humbly advise Her Majesty to reverse the judgment of the Superior Court, dated the 29th December 1882, and also the judgment of the Court of Queen's Bench dated the 23rd January, 1883, and to grant the prayer of the appellant's petition to have it declared that he is freed from his obligation to pay the purchase money, and to dismiss the petition of the respondents for *folle enchère*, with costs to be paid by the respondents to the appellant of all the proceedings in both Courts, the respondents must also pay to the appellant his costs of this appeal. There will be no order as to the costs of the Crown.

See DAMAGE: non delivery in sales.

DESCRIPTION OF BOUNDARIES. *See BOUNDARY: construction of titles as to boundary line.*

FRAUDULENT.

GODFREY V. POOLE ¹

13. An assignment in trust by a debtor to a third party with the object of realizing the real estate to pay off all debts, and with instructions to hold the surplus in trust for the separate use of the debtor's wife and children, is not revo-

¹ New South Wales, 1888 March 17, L. R. III Appeal Cases 497.

FRAUDULENT.

cable ; and such deed is not fraudulent or void as against the creditors' interests. *Thompson v. Webster*, 4 *Drem.* 632 ; *Clarke v. Wright*, 6 *H. & N.* 875 ; *Doe d'Offley v. Manning*, 9 *East*, 59 ; *Dolphin v. Aymard*, *L. R.* 4 *H. L.* 500. See **FRAUD**.

SIR BARNES PEACOCK, p. 502 :—There is no principle, nor is there, so far as their Lordships know, any decision, which supports the position that a deed which contemplates the full payment of all creditors as its primary object, can be held void as intended to defeat or delay creditors.

FUTURE SUCCESSION.

GODFRAY V. GODFRAY¹

14. A sale by an expectant heir of his right in a future succession is by the Norman law voidable, and may be set aside by the courts upon demand made by an interested party. But such sale is not absolutely void.

LORD JUSTICE TURNER, p. 337 :—No authority, then, has been cited, and probably none can be cited, sufficient in our opinion to show that a sale by an expectant heir of his expected succession, made without the concurrence of the person from whom it is to descend, is absolutely unimpeachable. All the writers and commentators on the Norman law treat it as either voidable or void, but in which of these two lights it ought to be viewed there is a great difference of opinion. Writers of great and equal eminence range themselves on different sides. The controversy extends to transactions of other kinds, whereby future rights are interfered with or modified. Many of the writers upon the subject make a distinction between contracts forbidden because they affect the rights of individuals, and contracts forbidden as *contra bonos mores*. They consider the former to be only voidable, that they are good until set aside by judicial process, and may be confirmed or rendered indisputably good by the lapse of a short period of prescription without reclamation. They consider the latter to be absolutely null, as if they had never been made, not admitting of confirmation and not requiring a judicial sentence to set them aside, and that possession under them is simply adverse and wrongful possession. Other writers draw no such distinction, but include all such contracts in the former class of voidable contracts.

The prohibition against an expectant heir dealing for his future inheritance is derived from the civil law, which, amongst other objections to it, treated it as *contra bonos mores*, because *inducit votum captandæ mortis alienæ* : *Cor. Jur. Civ.* ; *Code, lib.* VIII, tit. I, 61 ; and the prohibition, as well as the reason for it, were thence imported into the Norman law. It is not perhaps clear, having regard to the relationship of the parties and the rights of

¹ Jersey, 1865 July 27, III Moore N. S. 316.

FUTURE SUCCESSION.

succession consequent upon it, that a case like the present would fall within that principle.

But even assuming the contract to be *contra bonos mores*, the question still remains which of the opinions of the writers on the subject should be adopted, that the contract was void, or that it was only voidable. If we were to rely exclusively or chiefly on the continental writers upon the *Coutume*, it might be difficult to arrive at a conclusion on this point; but we have, upon this subject, the authority of *Le Geyt*, as high an authority as can be produced on the local law of *Jersey*.....

In his treatise "*De la Nullité des Contrats et des Sentences*," vol. i. p. 119, *et seq.*, he discusses the question of the degree of invalidity attributable to contracts of a nature cognate to that in the present case, and like it, prohibited by the *Coutumier*; deeds by a proprietor in possession in favour of some members of his family in derogation of the rights of succession of other members. After reviewing the conflicting opinions of the continental writers on the *Coutumier*, he comes to the conclusion that the strictness of the civil law had been much mitigated, and that all such contracts are merely voidable, requiring a judicial sentence to supersede them. He next deals with contracts by expectant heirs, and with respect to these he comes to the same conclusion, vol. i. p. 122: "*Un autre exemple d'un contrat contre loy, mais qui n'emporte pas une pleine et absolue nullité de droit, c'est quand on contracte de la succession d'un homme vivant, pactum de hereditate viventis.*" He is treating throughout of the local law of *Jersey*, upon which his opinion ought to be allowed greater weight than that of any of the old French commentators, however eminent, upon the *Coutume*, and, *à fortiori*, than that of more modern French writers, who speak of the existing law of their own country.

The current of modern decisions of the courts of the Island is altogether in accordance with the opinion of *Le Geyt*.

By the local customary law, parties wronged by unconscionable bargains are allowed a period of thirty years, reckoning from the date of the sale, to set them aside. But the ratio of inadequacy of consideration is strictly defined. "*Grand Coutumier*," by Rouillé, *ad finem* (*Stille de procéder*), lxxx. [Ed. Rouen, 1539.] Terrien, 329 [Ed. Rouen, 1554]. According to the *Coutumier*, in order to justify the interference of the court to set aside a sale, proof must be given by the plaintiff that less than half the value has been given for the property purchased. A case of the year 1598, *Lemprière v. Trachy*, has been cited, from which it would appear that the ratio had been altered in *Jersey* to two-thirds; but this alteration appears to stand upon the questionable authority of the ordinances of the commissioners, Messrs. *Pyne* and *Napper*¹. But whichever of the two be the present legal limit, the result, in this case, is the same: the cases of sales of property of uncertain value do not fall within the rules.

The commentators who are of authority upon the subject lay it down that the process for rescinding a bargain for inadequacy of consideration cannot be applied to sales of things of doubtful value.

¹ See Report of Commissioners on the Laws of *Jersey*, 1861, pp. vii. lv.

FUTURE SUCCESSION.

Thus, *Berault*:—" *Faber resout que ladite loy n'a point de lieu en vente de choses douteuses. Ce qui fait à la question tant débattue si elle a lieu en vente de choses universelles, comme d'une succession, ores que la consistance en soit inconnue au vendeur: car la valeur en est incertaine, à cause de l'ignorance des debets et charges passives: Et conséquement le vendeur ne peut alléguer de déception qui a reçu un prix certain pour une chose incertaine.*" 1 *Berault*, 77 [Ed. Rouen, 1176].

Pothier is of this opinion. "*Œuvres de Pothier*," Tom. ix. p. 326: [Ed. Paris, 1827].

The local law of *Jersey* thus providing for the case, it is, of course, out of the question to apply the principles of the English law, if, indeed, it could in any case be done.

In the view which we have taken of this case it may not, perhaps, be necessary for us to enter into the question of the validity of the deed of the 17th of July, 1835; but as it was argued that the whole transaction between these parties was in effect a transaction of settlement of the respondent's successions, and not a purchase, it may be right for us to state our opinion as to the effect of this deed. The respondent raises two objections to it: first, that it was not passed on oath, in the usual way; and, secondly, that the performance of the trusts cannot be enforced.

Until recently trusts were unknown in *Jersey* (Report of Commissioners of 1859, p. xxv.). Within the last half-century several instances have occurred of conveyances of land upon trusts for public objects; two instances are given in the appendix.¹ In each case the deed, passed on oath in the usual way, served both as a conveyance of the land and for the declaration of the trusts. In the present case the property was first conveyed by the deed of the 24th of March, 1835, and the legal ownership has since remained unchanged; but a subsequent declaration of trust was made by an independent instrument, that of the 17th of July, 1835. Did this require the same formalities as a legal conveyance? Probably the question has never yet arisen in *Jersey*, and will now have to be determined on principle. There seems to be no ground for holding that such formalities are necessary. A writing signed by the competent parties ought surely to be sufficient evidence of the trusts, if the law allows such to be created; and the law of *Jersey* does not, it would seem, forbid the creation of trusts by acts *inter vivos*. Report of Commissioners of 1859, p. xxv.

Provided, then, that the purchase of March, 1835, was free from fraud or inadequacy of consideration, the just conclusion appears to us to be that, originally the transaction was merely voidable.

INTEREST ON PRICE OF

STRATTON V. SYMON²

15. It was stipulated in an agreement of sale that the price was to be paid in instalments, the four last to be retained

¹ Aubin to The St. Helier's General Cemetery Company, dated 25th March, 1854. Edge to The Gas Company, dated the 30th September, 1856.

² St. Vincent, 1838 Feb. v, 11 Moore 125.

INTEREST ON PRICE OF

in the hands of the purchaser, by way of security, for the due execution of the conveyance; and then, the purchaser was to give bills of exchange payable in ninety days for the capital and interest.

Under this deed, the purchaser is not held to pay compound interest upon any of the purchase-money.

JUDICIARY**WICKHAM V. NEW BRUNSWICK AND CANADA RAILWAY COMPANY**¹

16. The purchaser at a judicial sale obtains no more rights in the property sold than those which could be granted by the proprietor before the sale.

LORD CHELMSFORD, p. 431 :—There is no doubt upon principle, as well as on the authority of the cases cited in the argument at the Bar, that the right of a judgment creditor under an execution is to take the precise interest, and no more, which the debtor possesses in the property seized, and consequently that such property must be sold by the Sheriff, with all the charges and encumbrances, legal and equitable, to which it was subject in the hands of the debtor. In other words, what the debtor has power to give is the exact measure of that which the execution creditor has the right to take.

LAW OF LOWER CANADA AND OF ENGLAND SIMILAR.**LOGAN V. LE MESURIER ET AL**²

17. The old French law on sales grounded on the civil law, is, in substance, the same as the law of England.

BOSWELL V. KILBORN³

18. There is no material difference between the English law and the old French law with respect to the completion of a sale.

NULLITY OF**MARETT V. JEUNES**⁴

19. By the law of Jersey, a sale made within the forty days before the death of the vendor, is null, and the heir of the person conveying it may recover back the estate from the purchaser, by refunding the money if he has it; but when the money has been distributed amongst several persons, the buyer must get back the money from them as he can.

OF MINORS' PROPERTY. See MINORITY: *iusdem verbis*.

OF SUBSTITUTED PROPERTY. See SUBSTITUTION: *iusdem verbis*.

¹ New Brunswick, 1865 Dec. 22, III Moore 417.

² Lower Canada, 1847 Dec. 7, VI Moore 131.

³ Lower Canada, 1862 Feb. 7, XV Moore 399.

⁴ Jersey, 1829 June 26, I Knapp 103.

PURCHASE BY ATTORNEYS.

PISANI V. ATTORNEY GENERAL FOR GIBRALTOR.¹

20. A sale by a client to his attorney was maintained in this cause. In such transactions, the burden is upon the attorney to show that the bargain is the best that can be made for his client, as the court will watch them with jealousy. Precipitation will be looked upon with very little favour, and the attorney will better consult his position by procuring the intervention of another professional man. *Gibson v. Jeyes* 6 Ves. 271; *Savery v. King*, 5 H. L. C. 655; *Holman v. Loynes*, 4 M. & G. 278; *Edwards v. William*, 32 L. J. (Ch.) 763.

RIGHT OF RE-SALE.

PAGE V. COWASJEE EDULJEE²

21. If before actual delivery the vendor re-sells the property on account of the default of the purchaser, the re-sale does not annul the sale, and the purchaser cannot recover any back deposit of the price, or resist paying any balance which may be still due. The same rule applies where there has been a delivery, and the vendor afterwards takes the property out of the possession of the purchaser, and re-sells it.

22. But there may be cases where, if goods sold are left in the possession of the vendor, and the purchaser will not remove them and pay the price, after receiving express notice from the vendor that, if he fails to do so, the goods will be re-sold, the vendor might re-sell without rendering himself liable to an action of trover.

LORD CHELMSFORD, p. 523:—In this case the vessel had been delivered to the defendant and he was in complete possession. The act of the plaintiff in retaking and selling her was wrongful, and entitled the defendant to bring an action of trover, but did not amount to a rescission of the contract. If, when the defendant declined to pay the balance of the purchase money, and altogether repudiated the agreement, the plaintiff had taken him at his word and resumed possession without anything more being said, the case might have been different; but, instead of the plaintiff agreeing to take the vessel back, and rescind the contract, he gave express notice to the defendant that the vessel would be re-sold at his risk, in terms of the conditions of sale. "There is no case to be found in the books where, after a sale and complete delivery of a chattel, and the price not paid, the vendor's taking the property out of the purchaser's possession has been held to amount to a rescission of the contract. *Martindale v. Smith* (1 Q. B. Ref. 389), and other cases have determined that, where there is an agreement to purchase pro-

¹ Gibraltar, 1874 June 23, L. R. V P. C. 516.

² Ceylon, 1866 Feb. 3, III Moore N. S. 499.

RIGHT OF RE-SALE.

perty, to be paid for at future time, and the money is not paid at the day, the property remaining in the possession of the vendor, he has no right to sell it, and if he does the purchaser may maintain trover against him. There may be cases where the vendor might sell without rendering himself liable to an action, as where goods sold are left in the possession of the vendor, and the purchaser will not remove them and pay the price, after receiving express notice from the vendor that, if he fail to do so, the goods, will be re-sold. But the authorities are uniform on this point, that if before actual delivery the vendor re-sells the property while the purchaser is in default, the re-sale will not authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it which may be still due. If this is the case where the possession of property sold remains with the vendor, *a fortiori* must it be so where there has been a delivery, and the vendor takes it out of the possession of the purchaser and re-sells it."

RIGHT OF UNPAID VENDOR.ROCHECOUSTE V. DUPONT ¹

23. By the law prevailing in the Island of Mauritius, the sale of moveables made on credit, may be resiliated and the property transferred to the vendor, when default has been made in payment by the purchaser according to the terms of the contract, notwithstanding that their value may have been increased while in the possession of the purchaser.

24. This rule of law is applicable to plant, consisting of sheds, machinery, cattle, implements, and other articles, or a sugar estate.

GRICE V. RICHARDSON ²

25. Unless actual possession of the goods has been delivered to the purchaser, the vendor is not deprived of his right of lien as against the assignees of the purchaser, in the event of his insolvency; and the same principle applies where the vendors were also warehousemen of the goods sold, under an arrangement with the purchasers to pay warehouse rent.

SIR BARNES PEACOCK, p. 322:—In the cases of *Bloxam v. Sanders*, and *Bloxam v. Morley*, which are reported in 4 *Barnwell* and *Cresswell's Reports*, p. 949, Mr. Justice Bayley lay down the rule very clearly. He says: "The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion; and payment or a tender of the price is a condition precedent on the buyer's part, but until he makes such payment or tender, he has no right to the possession. If goods are sold upon credit, and nothing

¹ Mauritius, 1864 Dec. 2, II Moore N. S. 195.

² Victoria, 1817 Dec. 6, L. R. III Appeal Cases 319.

RIGHT OF UNPAID VENDOR.

is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession; and the right of possession and the right of property rest at once in him. But his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession. Whether default in payment when the credit expires will destroy his right of possession, if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to inquire, because this is a case of insolvency; and in cases of insolvency the point seems to be perfectly clear."

It seems, therefore, to be clearly settled, that unless actual possession has been delivered to the purchaser the vendor is not deprived of his right of lien as against the assignees of the purchaser in the event of his insolvency.

But the question in this cause arises from the circumstance that the appellants filled the double character of vendors and warehousemen. By the delivery order it was stated that rent was to commence from the 12th of January, 1876; and it appears that at the time when Webster & Co. obtained a transfer of the goods to themselves, their clerk had the rent calculated up to the month of July. The question then comes, was the arrangement that warehouse rent was to be paid equivalent to an actual delivery, so as to prevent the vendors from having their right of lien. That point seems to have been determined in the case of *Miles v. Garton et al*, which has been cited from the 2nd *Crompton and Meeson's Reports*, p. 504. The following is the marginal note in that case: "Goods were sold under an invoice which expressed that they remained at rent. The vendee subsequently accepted a bill drawn by the vendor for the price which was negotiated by the vendor. Whilst the bill was running, the vendee sold a part, which, by his direction, was delivered by the vendor to the sub-vendee, whom the vendor charged with warehouse rent for the part, which he paid. Subsequently the vendee became bankrupt, and the bill was dishonoured. Held that the assignee of the bankrupt vendee could not without paying the price maintain trover against the vendor for the residue of the goods which had remained in his hands." In the argument in that case it was contended that the vendor held in two capacities, one as warehouseman and the other as vendor. Sir Wm. Follett, in arguing the case, said: "It can surely make no difference whether the receipt of rent, and the other acts shewing a delivery, are done by a third person, for whether the vendor unites in himself the character of vendor and warehouseman; the acts done by him as a warehouseman must have the same effect on his rights as vendor as if those acts were done by a third person being a warehouseman, and not the vendor." In answer to that remark Mr. Justice Bayley says: "The goods remained in the possession and control of the vendor. When the goods are in the hands of a third person, such third person becomes by the delivery order the agent of the vendee, instead of the vendor, and it may then well be said that the warehouse is the warehouse of the vendee, as between him and the vendor. I do not think that the payment of warehouse rent has the effect of a constructive delivery

RIGHT OF UNPAID VENDOR.

of the whole in a case where the goods remained in the possession of the vendor."

In this case the goods, whilst in the warehouse, though rent was payable for them, remained in the possession of the appellants; and their Lordships are of opinion that as the goods remained in the possession of the vendors, and no actual delivery had been made to the purchasers, the vendors' lien revived upon the insolvency of the vendees.

RIGHT OF TENANT.**BARNHART V. GREENSHIELDS.¹**

26. Where a tenant is in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and the equity of the tenant extends not only to interests connected with his tenancy, but also to interest under collateral agreements.

27. And the possession of the tenant is a sufficient notice that he has some interest in the land.

28. A purchaser having notice of that fact, is bound, according to the ordinary rule, either to inquire what that interest is, or to give effect to it, whatever it may be. *Taylor v. Stibbert* 2 Ves. Jun. 437; *Daniels v. Davison*, 16 Ves. 249; *Alien v. Anthony*, 1 Wer. 232; *Taylor v. Stibbert* 2 Ves Jun. 437; *Crafton v. Ormsby* 2 Sch. & Lef. 583; *Jones v. Smith, Hare*, 60; *Sailey v. Richardson*, 9 Hare, 734.

RIGHT TO RESCIND.**WOOLCOTT V. PEGGIE.²**

29. In an action by purchasers for specific performance of a contract for the sale of some real property, which contained a proviso to the effect that the vendor might annul the sale on his being unwilling or unable to remove any objection to title, it appeared that the purchasers conditionally offered to give time for the removal of their objection and that the vendor in good faith objected to the conditions, and was threatened with litigation in consequence. Under these circumstances, it was held that the vendor was entitled to rescind.

STOPPAGE IN TRANSITU.**COWASJEE V. THOMPSON.³**

30. Goods were contracted to be sold and delivered "free on board." They were duly delivered on board, and receipts taken from the master. The purchaser paid for the goods by a bill drawn on him by the seller and duly

1. Upper Canada, 1853 Dec. 5, X Moore 18.

2. Victoria, 1889 Nov. 14, L. R. XV Appeal Cases 42.

3. Bombay, 1845 June 21, V Moore 165.

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accepted by the purchaser. This latter having become insolvent before the bill became due, the seller stopped them *in transitu*.

The Judicial Committee held, that trover would not lie for the goods, for that on their delivery on board the vessel, they were no longer *in transitu*, so as to be stopped by the seller; and that the fact that the seller had retained the receipts of the master was immaterial, as after his election to be paid by a bill, the receipt of the master was not essential to the transaction between the seller and purchaser.

HUTCHINGS V. NUNES¹

31. A merchant residing at Jamaica ordered goods from Baltimore on 28th March. On the next day, 29th March, finding his insolvency imminent, he wrote to his vendor informing him of the state of his affairs and offering him to rescind the contract. On 31st March, he was declared insolvent. On 16th April the vendor received the letter, and sent a power of attorney to his agent at Jamaica to stop the goods. On the cargo arriving on 21st April, the agent who had been informed of the facts by the insolvent took possession of the cargo. The official assignee of the insolvent then demanded it on behalf of the estate. On 6th May the agent received his power of attorney.

In the action by the official assignee against the agent for the cargo, the Judicial Committee held, that the unpaid vendor, could on 21st April have stopped the cargo *in transitu*, and his agent had effectually done so in his name; and that the letter from him to his agent sent on 16th April, though not received till 6th May, was a sufficient authority to establish the agency.

RODGER V. THE COMPTOIR D'ESCOMPTE DE PARIS²

32. A firm sold goods to a merchant at Hong Kong, on ten months' credit to be shipped to that place. Before the goods reached their destination, the purchaser being insolvent, assigned to a bank, in consideration of a debt anterior to the contract with the vendors, all their estate, goods, bills of lading, etc.

Held, that the pre-existing debt was not a valuable consideration for the assignment, so as to defeat the right of the unpaid vendors to stop the goods *in transitu*; and, that the *transitus* had not ended before the arrival of the goods at

¹ Jamaica, 1863 Oct. 10, IX Law Times N. S. 125.

² Hong Kong, 1869 Feb. 5, V Moore, N. S. 538.

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Hong Kong, as the *transitus* continued while the goods were in charge of a third party, contracted with as carrier for the purpose of forwarding them.

SIR JOSEPH NAPIER, p. 554:—The general rule is, that where goods are sold to be sent to a particular destination named by the vendee, the right of the unpaid vendor to stop them continues until they arrive and are delivered there according to the bills of lading.

PEASE V. GLOAHEC¹

33. The vendor of goods sent with them to his agent, a bill of lading made to order and assigns. The agent indorsed the same, and took the acceptance of the purchaser to hold as security till the vessel arrived. The purchaser then got back by fraud the bill of lading from the agent and indorsed the same to the appellant for value. The vendor being informed of that fact stopped the goods *in transitu*. The Judicial Committee held that as the purchaser had transferred the bill of lading for value to an innocent purchaser, the right of the vendor to stop the goods was gone; that it made no difference that the purchaser had got back the bill of lading from the agent by fraud.

LORD CHELMSFORD, p. 7:—A bill of lading for the delivery of goods to order and assigns is a negotiable instrument, which by indorsement and delivery passes the property in the goods to the indorsee subject only to the right of an unpaid vendor to stop them *in transitu*. The indorsee may deprive the vendor of this right by indorsing the bill of lading for valuable consideration, although the goods are not paid for, or bills have been given for the price of them which are certain to be dishonoured, provided the indorsee for value has acted *bona fide*, and without notice. Although a bill of lading is a negotiable instrument, it is so only as a symbol of the goods named in it, and as was said by Lord Campbell in *Gurney v. Rehrend*, 3 Q. B. 634: "Although the shipper may have indorsed in blank a bill of lading deliverable to his assignees, his right is not affected by an appropriation of it without his authority and if it be stolen from him or transferred without his authority a subsequent *bona fide* transferee for value cannot make title under it as against the shipper of goods." This dictum is very carefully confined in its terms to the original transfer of a bill of lading deliverable to the assigns of the shipper. In the cases which it supposes there could be no lawful assigns of the shipper, and consequently the bill of lading could have no existence as a negotiable instrument.

But in the present case, the shippers of the goods having obtained a bill of lading, indorsed it to order and assigns, and forwarded it to Stericker for the express purpose of its being indorsed by him, and handed over to S. By the indorsement and delivery to S., they

¹ Admiralty, 1866 August 4, 15 Law Times, N. S. 6.

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acquired the complete property in the goods and contract over the bill of lading, subject only to the right of M., to stop *in transitu* as long as it remained in their hands. This is not denied by the respondent, but his case is that S. having, after the indorsement and delivery of the bill of lading, returned it to Stericker to retain as a security for the payment of the bill of exchange accepted for the price of the goods, and having afterwards obtained it from him by a misrepresentation, they had no power to pass a title in it to Pease & Co., at least without being subject to the lien created by the deposit with Stericker, and consequently that the right to stop *in transitu* against P., through *bona fide* indorsees for valuable consideration, still subsisted. There can be no doubt that although the vendors had parted with the property in the bill of lading by the indorsement to S., they acquired a title to hold it by the terms of the agreement under which it was deposited with Stericker. These terms do not include any stipulation that the vendors should not so deal with the bill of lading as would in the event of their insolvency defeat the right to stop *in transitu*. It is not even stipulated that the vendors should hold the bill of lading till the sub-vendees should give them a bill of exchange or other security for payment. The bill of lading was not made subject to any new condition or limitation, but was merely deposited with the vendors till the arrival of the ship or the sale of the goods. S. had power to sell, not by reason of any authority arising out of the agreement, but by virtue of their ownership in the goods. The power to sell of course included a power to pledge. The vendors by keeping the bill of lading in their hands might have prevented S. from dealing with it. They chose to deliver it back to them, induced to do so indeed by the fraudulent representation of S., but still consenting to their possession of it. The indorsees acquired no new title from the vendors by the fraud of S., but merely obtained their own property and the means of effectually disposing of it. The vendors had not, strictly speaking, a lien, which means a right to retain property against the will of the owner of it, and which is lost when the possession is parted with. They had, by the agreement of the indorsees and owners, a right to hold the bill of lading as a security. As in the case of lien so in this case, as long as the bill of lading remained with the parties who had fraudulently obtained it, the vendors who had been cheated out of the possession might have reclaimed and recovered it. But the moment it passed into the hands of Pease & Co., to whom it was pledged and indorsed for valuable consideration without notice, the right of the vendors to follow it was taken away. Vide *Dyer v. Pearson* 3 B. & Cr. 42; *Kingsford v. Merry*, 11 Ex. 577.

LYONS V. HOFFNUNG¹

34. Where the goods, at the time of the sale, are intended by the purchaser to pass direct from the possession of the vendors into that of a carrier, to be carried to a destination

¹ New South Wales, 1890 July 15, L. R. XV Appeal Cases 391.

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indicated by the buyer, in case of the insolvency of the latter, the goods, whether delivered or not to the carrier, are *in transitu* and may be stopped by the vendor.

LORD HERSCHELL, p. 396:—The test laid down by Lord Ellenborough in the case of *Dixon et al v. Baldwin et al*¹ appears clearly to cover such a case as this. Alluding to the case of *Hunter v. Beal*,² in which it was said that "the goods must come to the *corporal touch of the vendees*, in order to oust the right of stopping *in transitu*," Lord Ellenborough says that this was "a *figurative* expression, rarely, if ever strictly true. If it be predicated of the vendee's own actual *touch*, or of the touch of any other person, it comes in each instance to a question whether the party to whose touch it actually comes to be an agent so far representing the principal as to make a delivery to him a full, effectual and final delivery to the principal, as contradistinguished from a delivery to a person virtually acting as a carrier or means of conveyance to as on the account of the principal in a mere course of transit towards him

The law appears to their Lordships to be very clearly and accurately laid down by the Master of the roll in the case of *Bethel v. Clark*.³ He says: "When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit; then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu* and may be stopped."

TITLE.

FORTE V. BEETE ET AL.⁴

35 The appellant bought at a judicial sale made by the Provost Marshall, (sheriff) of British Guiana certain real estate. After he had paid the price of the sale into court, the Provost Marshall could not give a title to the immovables sold as there was an essential error in the description. He then made several petitions praying the Supreme court either for a title to the land purchased, or to be refunded his money, which were dismissed leaving him with his only recourse to the sovereign, *restitutio integra* with *committimus*.

The Judicial Committee rendering substantial justice, annulled the execution sale and directed that the money paid into court should return to appellant, compensating the rents and profits received by the appellant while in possession, by loss of interest on money deposited in court.

1. 5 East, 175.

2. Cited in *Ellis v. Hunt*, 3 T. P. 467.

3. 20 Q. B. D. 615.

4. British Guiana, 1854 Nov. 28. IX Moo: 336.

TO TRUSTEES.

CLARK V. CLARK.¹

36. A sale cannot be impeached merely because when entered upon the purchaser may, at his option, become the trustee of the property purchased, though in fact, he never does become such.

SIR ARTHUR HOBHOUSE, p. 737 :—A man so placed might possibly use his power in such a way as to raise a case for setting aside the transaction, and whether David (the purchaser) so acted is one of the questions to be decided. But that is a different thing altogether from the absolute disability attaching to one who would at the same moment be a vendor in trust for others and a purchaser on his own behalf.

WARRANTY AGAINST EVICTION.

THE CHAUDIÈRE GOLD MINING CO. V. DESBARATS.²

37. Warranty implied by law may be excluded by express warranty, but neither of them can be resorted to in an illegal sale, as the right of warranty implied or express can only spring from a valid sale.

DUCONDU V. DUPUY.³

38. In sales of "timber limits" under the Consolidated Statutes of Canada, ch. 23, a clause is always inserted which provides that if any license is found to cover ground already occupied by a prior license, the subsequent sale shall to that extent be null and void.

Under a contract of sale made by a licensee of such timber limits to a third party, with the simple warranty (*garantie de tous troubles généralement quelconques*), the vendor is not obliged to protect the purchaser against eviction by a person claiming to be entitled under a prior license to a portion of the limits sold.

WHAT IS

BARTON V. BANK OF NEW SOUTH WALES.⁴

39. The appellant being indebted to the respondent bank deposited with the latter the title deeds of certain lands belonging to him. Later on he signed an indenture setting forth that "it has been agreed between the parties hereto that the said Willam Barton shall convey to the said bank of New South Wales the three parcels of lands hereinafter described in manner hereinafter expressed, and that the said debt shall be reduced by the sum of £400."

¹ Victoria, 1884 July 12, L. R. IX Appeal Cases 733.

² Quebec. 1873 July 29, L. R. V P. C. 277.

³ S. C. Canada, 1883 Nov. 27, L. R. IX Appeal Cases 150.

⁴ New South Wales, 1890 July 15, L. R. XV Appeal Cases 379.

WHAT IS

The Judicial Committee held, that the bank became the absolute owners of the lands at the price of £400, and that besides the above clause, the expressions "in part payment of the debt," "whole or part of the difference" which were to be found in the deed demonstrated the intentions of the appellants to sell his lands.

LORD WATSON, p. 380 :— Now, undoubtedly the terms of the conveyance may be qualified by collateral evidence, but in order to set aside the arrangement which the parties have assented to by executing and receiving the deed, very cogent evidence is required in a case like the present. Where there is simply a conveyance and nothing more, the terms upon which the conveyance is made being apparent from the deed itself, collateral evidence may easily be admitted to supply the considerations for which the parties interchanged such a deed; but where in the deed itself the reasons for making it, and the considerations for which it is granted, are fully and clearly expressed, the collateral evidence must be strong enough to overcome the presumption that the parties in making the deed had truly set forth the causes which led to its execution.

WHEN THE CONTRACT IS PERFECT.

LOGAN ET AL. V. LE MESURIER ET AL.¹

40. Where a sale of goods is made by measurement, but, before the measurement is effected, the goods are destroyed, the loss falls on the seller.

41. The appellants, merchants of Montreal, bought from respondents 50,000 feet, more or less, of red pine timber to be delivered at a certain boom at Quebec, at so much per foot, measured off. The price was paid according to contract, there being an understanding that if the quantity fell short the difference was to be refunded by the sellers. The timber was not delivered on the day prescribed in the contract of sale, and when it arrived at Quebec, and before it was measured and delivered, the raft was broken up by a storm, whereby the greater part of the timber was dispersed and lost. The purchasers, after the storm, collected such of the timber as could be saved, paid salvage for it, and applied the timber saved to their own use. Afterwards they brought an action against their vendors to recover the amount paid for the timber lost and not delivered.

The Judicial Committee held that by the terms of the contract, until the measurement and delivery of the timber was made, the sale was not complete; and that the transfer of the property was postponed until the measurement at the delivery; and that the risk remained with the sellers.

¹ Lower Canada, 1847 D.C. 7, VI Moore 116.

WHEN THE CONTRACT IS PERFECT.

42. That the taking possession of a part of the timber by the purchasers, after the day mentioned for the delivery thereof in the contract, and not at the place agreed upon for the delivery, could not be considered as an acceptance of the whole; nor could it be considered as an admission that the property in the timber passed to them before the storm which broke up the raft.

LORD BROUGHAM, p. 132:—Now, to constitute a sale which shall immediately pass the property, it is necessary that the thing sold should be certain, should be ascertained in the first instance, and that there should be a price, either ascertained or ascertainable. But the parties may buy or sell a given thing, nothing remaining to be done for ascertaining the specific thing itself, but the price to be afterwards ascertained in the manner fixed by the contract of sale, or upon a *quantum valeat*; or, they may agree that the sale shall be complete, and the property pass in the specific thing, chattels or other goods, although the delivery of possession is postponed, and although something shall remain to be done by the seller before the delivery; or they may agree, that nothing remains to be done for ascertaining the thing sold; yet, that the sale shall not be complete, and the property shall not pass, before something is done to ascertain the amount of the price. The question must always be, what was the intention of the parties in this respect; and that is, of course, to be collected from the terms of the contract. If those terms do not show an intention of immediately passing the property until something is done by the seller, before delivery of possession, then the sale cannot be deemed perfected, and the property does not pass until that thing is done. It is unnecessary to go through the cases relating to these positions. None of them will be found at all to impugn them. Indeed, taken together, they clearly support it, as does the old French, and the Civil Law.

NUTTYLOLL V. O'DOWDA¹

43. A merchant sold and assigned certain goods which were to be found in his warehouse, for a certain sum of money acknowledged to have been paid at the date thereof. In an action of trover brought by his assignee, it appeared in evidence, that a portion only of the goods was in the warehouse at the time of the sale, that the purchase price was not paid as mentioned, but by instalments a few days afterwards. The defendant obtained a verdict on the ground that the plaintiff failed to prove any assignment to himself of said goods, there being no connection between the goods described in the declaration and the places, times and goods spoken of by the witnesses. A new trial was granted by the Judicial Committee.

¹ Bengal, 1848 Feb. 29, VI Moore 324.

WHEN THE CONTRACT IS PERFECT.GILMOUR V. SUPPLE ¹

44. By the law of England, under a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties. If the seller is to do something to the goods sold on his own behalf, or for the benefit of the buyer or on behalf of both parties before the delivery of the goods, the property does not pass until he has done it, or waived his right to do it.

45. There is no distinction between the law of England and the law in force in Upper Canada in this respect, or between the law of England and the law of Lower Canada.

THE SOUTH AUSTRALIAN INSURANCE CO. V. RANDELL ²

46. In this cause, corn was deposited by farmers with a miller, to be stored and used as part of the current consumable stock or capital of the miller's trade, and was by him mixed with other corn deposited for the like purpose, subject to the right of the farmers to claim, at any time, an equal quantity of corn of the like quality, without reference to any specific bulk from which it was to be taken, or in lieu thereof the market price of any equal quantity, on the day of the demand, with a small charge for general purposes.

The Judicial Committee held, that such transaction amounted to a sale by the farmer to the miller, and was not a bailment of the corn, and entitled the miller to claim in respect thereof upon a policy of insurance against fire as for his own property, notwithstanding that such corn was not specifically insured, or described, as required by the conditions of the policy, as "goods held in trust and on commission" upon which condition the claim was resisted by the insurers.

SIR JOSEPH NAPIER, p. 351:—A bailment of trust implies that there is reserved to the bailor the right to claim a re-delivery of the property deposited in bailment.

"Wherever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity, and not for the return of his identical subject matter in its original or an altered form, this is a transfer of property for value, it is a sale, and not a bailment. (*Kent's Commentaries* Vol. II § 58, p. 781 (11th Ed.) cited.)

¹ Upper Canada, 1858 Feb. 26, XI Moore 551.

² Australia, 1869 Dec. 14, VI Moore N. S. 341.

WHEN THE CONTRACT IS PERFECT.

"Moreover, it appears to their Lordships, that there is no sound distinction, in principle, between this and the case of money deposited with a banker on a deposit receipt. It may have been deposited in negotiable paper, in bank-notes, or in sovereigns, but it is paid in upon the known course and conditions of the banker's dealings. A man is supposed to intend the natural consequence of his acts. He knows the course of dealing; he hands in the money; he gets a deposit receipt; he knows that the money is taken by the banker to be dealt with as part of his current capital, to be used as his own for his own purposes. By the deposit, it is placed in the disposing power of the banker; and surely he who has acquired the disposing power over property for his own benefit, without the control of another, has the beneficial ownership. *Foley v. Hill*, 2 H. L. C. 28 cited, also *Parker v. Marchant*, 2 *Phillip*, 360.

CUSHING V. DUPUY¹

47. The price must be fixed and determined in a sale: this is one of its essential incidents.

HUTTON V. LIPPERT²

48. A contract was made whereby the respondent guaranteed to one Ekstein to effect the sale of an estate for the sum of £9,000, within a certain date, the respondent to have the sole control and management of the property, with an irrevocable power of attorney, granting him the fullest power over the said property, so as to enable him to deal with it as he thought fit, and the respondent guaranteed the payment of the said £9,000 with interest from a certain date. It was also agreed that if the property were sold over £9,000, the respondent would keep the difference, and if it were not sold within the specified time to respondent the latter should be bound to take over the property at £9,000.

The Judicial Committee construed this deed as being a sale; the effect of it being to give Ekstein every right which a vendor could legally claim, and to confer upon the respondent every right which a purchaser could legally demand. It makes no difference that the parties have called the transaction a "guarantee."

SALVAGE**DUTIES OF THE SALVOR.**SHERSBY V. HIBBERT. THE "DUKE OF MANCHESTER"³

49. A sailing vessel was rescued by a steam tug, which, after rendering her salvage services, towed the vessel to a

¹ Quebec, 1880 April 15, L. R. V. Appeal Cases 409.

² Cape of Good Hope, 1883 March 14, L. R. VIII Appeal Cases 309.

³ Admiralty, 1847 July 1, VI Moore 90.

DUTIES OF THE SALVOR.

port, but in consequence of the misconduct and the negligence of the master of the steam-tug and her crew, the vessel was run ashore.

It was held that the steam-tug had no claim for salvage, as the master of the steam-tug was not released from all responsibility respecting the direction of the vessel towed, by reason of a licensed pilot being on board, and that it was the joint duty of the pilot and the master of the tug to do their utmost for the safety of the ship.

50. And the master of the steam-tug could not separate the towing of the vessel, from his claim for salvage services for getting her off the sands, as it was one transaction of salvage.

LORD CAMPBELL p. 99:—Therefore, however much the licensed pilot may misconduct himself, if the master of the tug, through gross negligence, omits to do what was in his power to keep the ship in a proper direction, that she may reach a place of safety, and thereby the ship is lost, or is led into peril as great as that from which she has been rescued, all claim to salvage is forfeited. This is not a claim for ordinary work and labour, but for salvage. The very notion of saving a ship, supposes that the sailor instead of merely executing orders, shall perform some extraordinary service, and exert himself to the utmost for the safety of life and property.

LIEN ON CARGO FOR SALVAGE SERVICES.

CLEARY v. McANDREW. THE CARGO EX "GALAM" ¹

51. The master of a vessel, who carries to its destination the cargo abandoned by a former ship, and who is still in possession of the cargo, has a lien on the cargo, either for freight or for salvage services preferable to a holder of a respondentia bond taken up by the first ship to render the ship seaworthy, the subsequent carrying on of the cargo having been essential to make it available for the holder of the bond, or for anybody else.

LORD KINGSDOWN, p. 234:—The subsequent carrying on of the cargo was essential to making it available either for the holder of the Respondentia Bond, or for anybody else. It was in the nature of salvage service, and in a competition of lien the ship owner who has rendered a service of this description is entitled to priority over the holder of a Respondentia Bond who has done nothing, and whose money has contributed nothing towards forwarding the cargo to its destination.

It is upon this sound principle of justice and common sense that, by the practice of the Admiralty Court, a prior Bottomry Bond is postponed to a subsequent one, and both are to claim for salvage after-

¹ Admiralty, 1863 July 27, 11 Moore N. S. 216.

LIEN ON CARGO FOR SALVAGE SERVICES.

wards arising, and that wages are also entitled to preference. These demands are all for services rendered to the owner of the Bottomry Bond, as well as to other persons interested in the ship and cargo.

We think, therefore, that the claim for freight is entitled to priority over the Respondentia Bond.

There remains the question of the claim for general average. On principle this seems to stand on the same reason as freight. It is a loss incurred for the general benefit of the ship and cargo, to which those who have received the benefit are by law liable to contribute ratably. And for this claim the master who has incurred the expenses has a lien on the goods. It is a possessory lien at common law, by virtue of which he is entitled to hold the goods till his lien be satisfied. If no Respondentia Bond was in question, there can be no doubt that *White* could not take the goods out of the hands of *Cleary* without paying, not only freight, but what is due for general average.

But it is said that the Court of Admiralty will take no notice of a claim for general average; and the learned judge in this case observes, "that over and over again, "from the earliest time I entered this court, the judges of this court have refused to entertain this "question," and again, "I must adhere to the practice of not deciding upon questions of average."

But unfortunately the judgment does decide the question, and determines that the Court of Admiralty may take a cargo out of the possession of a master who has, by Common law, a possessory lien upon it, without satisfying such a lien.

If such be the settled law of the Admiralty Court it must prevail, however contrary to principles usually acknowledged in the administration of justice. But it requires very clear authority to support it, and, upon examination, their Lordships have not found any.

To enforce and give effect to a lien at the instance of a party seeking to establish it is quite a different thing from setting it aside and annulling it when it arises in the court accidentally in the progress of a cause over which the court has properly jurisdiction. The captain here does not say, "I have by the maritime law a lien which the Court of Admiralty will enforce as it does in cases of Bottomry and other cases not depending upon possession;" but he says, "I am in possession of this cargo, and have a lien upon it, and by the law of England no man has a right to take it out of my possession till that lien is satisfied. "If he be right in law, as it appears that he is, how can the Court of Admiralty do that which no other court in the kingdom could do—destroy a right which exists by law?"

The case would be quite different if the captain, having parted with the cargo, had sought to enforce a lien in the Court of Admiralty. The lien would be gone (unless there were some special contract) with the loss of possession, and the Court of Admiralty would properly say: "We have no jurisdiction in this matter; we have no means of enforcing contracts or compelling contributions; we decline to interfere."

On examination of the cases referred to at the Bar, this appears

LIEN ON CARGO FOR SALVAGE SERVICES.

to be all that they have decided—not that when a possessory right of lien arises incidentally before the Court of Admiralty, such right will be treated as a nullity; but that when the court is called upon to enforce such a lien not depending upon possession, or to adjust the rights which grow out of it, the court will refuse to interfere.

The authorities cited by their Lordships are "*La Constancia*," 2 *W. Rob.*, 487; The "*North Star*," *Lush. Adm. Rep.* 356.

P. 240. It was said, however, that the respondentia bondholder was entitled to preference, because the holder of such security is not liable to contribute to general average. That is so as between the owner of the cargo and the holder of the bond, but not as between the holder of the bond and those whose lien arises in respect of services by which the cargo itself has been made available.

PARTIES LIABLE TO PAY SALVAGE SERVICES.**BLIGH V. SIMPSON. THE "FUSILIER" ¹**

52. The owners of cargo are liable to contribute to that portion of the claim of the salvors which arises from saving the lives of passengers, although the salvors may have rendered no direct benefit to the cargo, as the benefit to property is not the only element of remuneration for salvage.

LORD CHELMSFORD, p. 73:—The general rule as to the parties liable to pay salvage is, that the property actually benefitted is alone chargeable with the salvage recovered. But this rule is inapplicable in the case of life salvage, because it is difficult to imagine a case where the saving of the lives, either of the crew or of the passengers of a vessel in distress, would be of any benefit, either to the vessel or to the cargo. The Legislature, therefore, could not have intended that the benefit to property should be the criterion of the liability to the payment of life salvage. All that seems to have been contemplated is, that there should be included in the entire sum payable for salvage of ship and cargo, a distinct reward for the preservation of human life.

QUANTUM OF SALVAGE.**THE "THETIS" ²**

53. In a case of salvage of a treasure, by great exertions, from a wreck derelict and sunk under water, one third of the amount saved was awarded to the salvors.

54. An admiral who had taken upon himself personal exertion and responsibility in recovering such treasure by means of the ships under his command, was given an eighth of the sum awarded for salvage.

55. The Admiralty was held to be entitled to repayment

¹ Admiralty, 1865 Feb. 9, III Moore N. S. 1.

² England, 1834 June 20, II Knapp 390.

QUANTUM OF SALVAGE.

for the pay, victualling, wear and tear of the king's ships employed in recovering such treasure.

SIR LANCELOT SHADWELL, VICE-CHANCELLOR, p. 410:—The giving of that sum will be in perfect accordance with the spirit of the decisions already made, which have certainly departed from the old rule of giving a moiety, and have rather tended to give a third of the value of the property saved, or thereabouts.

GORE V. BETHEL. THE "INCA" ¹

56. In no instance, however meritorious may have been the service performed, does the court of Admiralty in England decree more than a moiety for salvage.

57. Derelict being "*sine spe recuperandi*" is distinguishable from salvage in the amount awarded.

58. A decree of the Vice-Admiralty court of the Bahamas awarding seventy-six per cent in kind, for a most meritorious salvage service, attended with loss of life, varied upon appeal, by reducing the amount to five per cent upon the whole cargo, stores and materials.

TRASK V. MADDOX. THE "CARRIER DOVE" ²

59. There is no distinction between river salvage and sea salvage; the danger and meritorious nature of the services in either case being the ground on which the *quantum* of compensation is awarded.

BLIGH V. SIMPSON. THE "FUSILLIER" ³

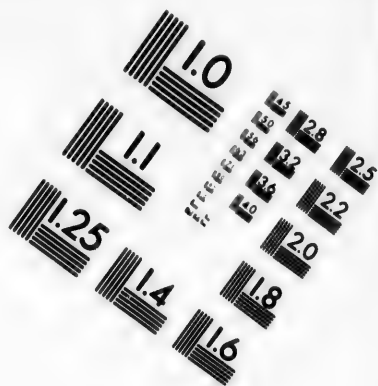
60. The accident of the amount of salvage awarded exceeding the value of the salvage vessels is wholly immaterial, as the value of such vessels is not an element to detract from the value of the salvage service.

LORD CHELMSFORD, p. 69:—Undoubtedly, the placing valuable property in peril may enhance the merit of salvage services; but it does not follow, on the contrary, that the trifling character of the property endangered will necessarily detract from the value of such services. It was not quite correctly said in argument at the Bar, that what is the first thing to be regarded, and the next the services which are rendered. It would have been more accurate to have reversed the order of these considerations, and to have said that the first thing to be regarded is the value of the services with reference to the amount of property rescued from peril; and the next, how far the merit of these services is enhanced by the risk to life or property which has been involved in them. Taking the grounds of

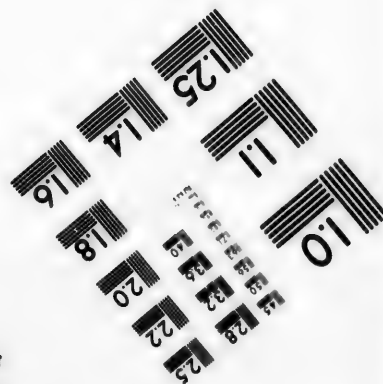
¹ V. A. Bahamas, 1858 June 24, XII Moore 189.

² Admiralty, 1863 July 30, II Moore N. S. 243.

³ Admiralty, 1865 Feb. 9, III Moore N. S. 51.



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QUANTUM OF SALVAGE.

claim to salvage in this order, it is obvious that it never can be an argument against the amount awarded to the salvors, that it exceeds the value of their property put in peril by the service.

KIRBY V. THE OWNERS OF THE "SCINDIA" ¹

61. In a case where the vessel being derelict, and her value, with the cargo on board, exceeding £30,000, was salvaged by two vessels, one of which, with her cargo on board, was worth £150,000, and the other above £3,000, and a tender of £2,000 for salvage services had been refused, which sum was awarded by the Vice-Admiralty court: the Judicial Committee, looking at the respective values, and taking into consideration the additional risk to the salvors from having to make a deviation in their course, held that sum insufficient, and increased the amount of salvage by £1,000.

62. The question how far a deviation in a vessel's course in the performance of salvage services to life or property, may cause the avoidance of a policy of insurance is not satisfactorily settled, though the risk of such may operate on the judge's mind in determining the amount to be awarded for salvage services.

PAPAYANNI V. HOCQUARD. THE "TRUE BLUE" ²

63. A derelict vessel and cargo of the value of £1,452 was salvaged by a steamer, which, with her cargo was of the value of £30,000, and the court below awarded £300 for salvage. The Judicial Committee held that, under the circumstances, that sum was not sufficient, and it was increased to £450.

DR. LUSHINGTON, p. 101: — It is perfectly true, as it has been argued on behalf of the respondents in these two cases³, that this court is always very reluctant to review cases of salvage, either coming from the Court of Admiralty or from the Vice-Admiralty Courts, on the sole ground of the pecuniary reward which has been bestowed in those courts being deemed to be insufficient; because it is manifest that in all these cases there is the exercise of individual discretion, and that exercise of individual discretion almost always differs among different persons. Still, however, if they think that the justice of the case has not been attained, it is the duty of this court, sitting as a court of appeal, to remedy any grievance which may appear to exist, and to do that which under the circumstances they may consider to be a right.....

¹ V. A. Cape of Good Hope, 1866 June 13, IV Moore N. S. 84.

² V. A. Malta, 1866 June 26, IV Moore N. S. 96.

³ This case and the above one were argued at the same time. The two judgments were also rendered the same day.

QUANTUM OF SALVAGE.

P. 104:—Now, in truth and in fact, when the court comes to consider the question of derelict or not, it takes into consideration the danger to the property; and so it does where the vessel is not derelict. The property may be in infinite danger, though it is not derelict; but the court always considers that one of the material ingredients, upon which it gives a large salvage, is the danger to the property; and the danger may be (we do not say it is, but the danger may be), and in certain cases of salvage it is, as great to the property which is not derelict as it is in other cases where the property is derelict. Therefore, the proper course to pursue in all these cases is to consider the fact of derelict as being, as it were, an ingredient in the degree of danger in which the property is.

CARMICHAEL V. BRODIE. THE "SIR RALPH ABERCROMBIE" ¹

64. In estimating salvage reward to the owners of the salving vessel, the circumstance that the salving vessel by deviating from her course might have vitiated the insurance, the possibility of being answerable to the owners of the cargo for such deviation, and the exposure to danger of the salving ship, in rendering salvage services, are elements to be taken into consideration.

ARNOLD V. COWIE. THE "GLENBUROR" ²

65. Salvage services of a highly meritorious character having been performed by salvors, in saving the lives of the crew, and the ship and cargo, valued at £46,000, the Admiralty court awarded £1,000 as salvage for such services. On appeal the remuneration was increased to £2,000 in consideration of the great danger the salvors incurred, and the fact of the saving of the lives, and the value of the ship and cargo.

LORD JUSTICE JAMES, p. 27:—His Lordships cited the case of *The Clifton v. Lightbody* (3 Hagg. Ad. Rep. 120) where Lord Stowell expresses himself as follows: "Now, salvage is not always a mere compensation for work and labour. Various circumstances upon public considerations, the interests of commerce, the benefit and security of navigation, the lives of the seamen, render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of a salvage service are, first, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow-creatures, and to rescue the property of their fellow subjects; secondly, the degree of danger and distress from which the property is rescued, whether it were in imminent peril or almost certainly lost, nothing out of it rescued and preserved; thirdly, the degree of labour and skill which

¹ V. A. Saint Helena, 1867 Feb. 27, IV Moore N. S. 374.

² Admiralty, 1871 Feb. 8, VIII Moore N. S. 22.

QUANTUM OF SALVAGE.

the salvors incur and display, and the time occupied. Lastly, the value. Where all those circumstances concur, a large and liberal reward ought to be given." But he goes on, but where none or hardly any, then the thing ought to be *pro opere et labore*.

"THE AMERIQUE"¹

66. Although the *quantum* of remuneration to salvors is to some extent to be affected by the value of the property saved, it must not be raised to an amount altogether out of proportion to the services actually rendered. When the court below had awarded an exceptional and excessive amount of remuneration solely from regard to the value of the property saved, the Privy Council, notwithstanding its general rule of non-interference upon a question of mere discretion, reduced the said amount by two-fifths.

BIRD V. GIBB. THE "DE BAY"²

67. Where the property saved is ample, losses voluntarily incurred by the salvor should be transferred to the owner of the property saved, and in addition the salvor should receive a compensation for his exertions and for the risk he runs of not receiving any compensation in the event of his services proving ineffectual.

68. The losses should be ascertained with precision where practicable, but in that case the salvage remuneration added thereto should be fixed on a more moderate scale than where the losses cannot be fixed with precision: property saved, £67,000; salvage awarded, £6,000.

OWNERS OF THE "THOMAS ALLEN V. GOW"³

69. In this cause the salvage remuneration was reduced from \$12,000 to \$7,500; their Lordships being of opinion that the difference between the sum awarded and that which would be liberal was so large as to require correction.

The Glenduror, L. R. 3 P. C. 589; *The Carrier Done*, 2 Moo. P. C. N. S. 254; *The Clarisse*, Swabey 184; *The Scindia*, L. R. 1 P. C. 241, (in which it was held that: "Unless the difference amounted at least at one third, the Committee would not interfere") were approved and followed.

See EVIDENCE: appreciation of: *Sam v. Brown*, *Greene v. Bailey*, *The "Neptune"*, *The "Clarisse"*, *The "Chetah"*.

¹ Admiralty, 1874 Dec. 19, L. R. VI P. C. 468.

² V. A. Malta, 1893 June 30, L. R. VIII Appeal Cases 559.

³ Admiralty, 1886 Dec. 11, L. R. XII Appeal Cases 118.

WHEN COMPLETED.

COLBY V. WATSON. THE " ENDEAVOUR " ¹

70. In an action for salvage services in getting a vessel off the Newcombe Sand, it appeared, that in order to get the vessel off the sand, both her bower anchors and chains were slipped, and that the salvors, after getting her off, called in the aid of another boat to recover the anchors. The master of the ship which brought assistance claimed part of the salvage service. Held, that the general salvage was completed, when the vessel was off the sand, and that the getting up of the anchors formed no ingredient in the salvage services so as to entitle those who recovered the anchors to share in the general salvage of the ship and cargo.

WHEN DUE.

HALSEY V. ALBERTUZEN. THE " JONGE ANDRIES " ²

71. A foreign vessel being in danger, in consequence of the boisterous state of the weather, and being leaky, hired an English fishing smack, by a written agreement, "to pilot and to sail ahead for £50." After four days of hard working and many difficulties the captain of the smack got the vessel into port. The owners of the smack refused the tender of £50, and brought an action for salvage services rendered to the vessel. The court of Admiralty was of opinion that the agreement being to perform a service for a specific sum was not to be set aside, because the weather became tempestuous, and held, that salvage was barred by the agreement, as nothing was done to convert pilotage into a salvage service, and that the sum specified in the agreement was a sufficient compensation. This judgment was confirmed on appeal by the Judicial Committee.

72. The court will not favour a claim for salvage by a party originally engaged as a pilot; but at the same time pilots are not to be compensated by mere pilotage remuneration when salvage services have been rendered.

WARD V. McCORKILL. " THE MINNEHAHA " ³

73. The "*Minnehaha*" loaded with a valuable cargo of cotton, on entering the mouth of a river brought up at anchor, being unable to continue her voyage to Liverpool by reason of the tide, which was ebbing, and the wind which was very strong. She then made an agreement with the "*United Kingdom*" to tow her to Liverpool, for thirty

¹ Admiralty, 1848 Feb. 28, VI Moore 334.

² Admiralty, 1857 Dec. 15, XI Moore 313.

³ Admiralty, 1861 July 11, XV Moore 133.

WHEN DUE.

guineas. The hawser was made fast, and the "*Minnehaha*" was towed up to her anchor, which was hove up, but soon afterwards the hawser broke and the ship drifted. The "*Storm King*" and the "*Enterprise*" joined the other and the three boats towed the ship to Liverpool.

Claims for salvage were made by the three boats, and allowed by the Judicial Committee, which reversing the judgment below, held: that a contract by a steam tug for towage may, from the danger in which the towed vessel is afterwards placed, and rescued by the tug, be superseded and converted into salvage service. But, in such circumstances, the claim to salvage is to be watched by the court with the closest attention and jealousy.

74. That a steam tug rendering salvage services must obey the orders of the pilot on board the vessel.

75. That the claimants to salvage must prove their own case, and show that, the vessel being in danger from no fault of theirs, they performed services which were not covered by the towage contract, and did all they could to prevent the danger.

76. That negligence, though not specifically pleaded in the answer, may be proved to negative a claim to salvage upon a simple traverse of salvage services; but if the defendants mean to charge the claimants with purposely having brought the ship in danger, such defence must be specifically pleaded in answer.

LORD KINGSDOWN, p. 152:—When a steamboat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so and will do so under all circumstances and at all hazards; but she does engage that she will use her best endeavours for that purpose, and will bring to the task competent skill, and such a crew, tackle, and equipments as are reasonably to be expected in a vessel of her class.

She may be prevented from fulfilling her contract by *vis major*, by accidents which were not contemplated and which may render the fulfilment of her contract impossible; and in such case, by the general rule of law, she is relieved from her obligations.

But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser. But if in the discharge of this task, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger and the towing vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor, instead of being res-

WHEN DUE.

stricted to the sum stipulated to be paid for mere towage. Whether this larger remuneration is to be considered in addition to, or in substitution for the price of towage, is of little consequence practically. The measure of the sum to be allowed as salvage would, of course, be increased or diminished according as the price of towage was or was not included in it. In the cases on this subject, the towage contract is generally spoken of as superseded by the right to salvage.

It is not disputed that these are the rules which are acted upon in the Court of Admiralty, and they appear to their Lordships to be founded on reason and on public policy, and to be not inconsistent with legal principles.

The tug is relieved from the performance of her contract by the impossibility of performing it, but if the performance of it be possible, but in the course of it the ship in her charge is exposed, by unavoidable accident, to dangers which require from the tug services of a different class and bearing a higher rate of payment, it is held to be implied in the contract that she shall be paid at such higher rate.

To hold, on the one hand, that a tug, having contracted to tow, is bound, whatever happens after the contract, though not in the contemplation of the parties, and at all hazards to herself, to take the ship to her destination; or, on the other, that the moment the performance of the contract is interrupted, or its completion in the mode originally intended becomes impossible, the tug is relieved from all further duty, and at liberty to abandon the ship in her charge to her fate, would be alike inconsistent with the public interests.

The rule as it is established guards against both inconveniences, and provides at the same time for the safety of the ship and the just remuneration of the tug. The rule has been long settled, parties enter into towage contracts on the faith of it; and we should be extremely sorry that any doubt should be supposed to exist upon it.

It is said that it has never been brought before us for decision. If so, considering how often the rule has been acted upon, the almost necessary inference is that it has never been made the subject of appeal, because it has been universally acquiesced in.

Whether the circumstances in each particular case are sufficient to turn towage into salvage must often be a subject of great doubt, as it is in the present case; but there is one point upon which their Lordships can entertain no doubt, and upon which they are surprised that any doubt should have been thrown at the Bar. If the danger from which the ship has been rescued is attributable to the fault of the tug; if the tug, whether by wilful misconduct, or by negligence, or by the want of that reasonable skill or equipments which are implied in the towage contract, has occasioned or materially contributed to the danger, we can have no hesitation in stating our opinion that she can have no claim to salvage. She never can be permitted to profit by her own wrong or default.

When it is remembered how much in all cases—how entirely in many cases—a ship in tow is at the mercy of the tug; how easily,

WHEN DUE.

with the knowledge which the crews of such boats usually have of the waters on which they ply, they may place a ship in their charge in great real or apparent peril; how difficult of detection such a crime must be, and how strong the temptation to commit it, their Lordships are of opinion that such cases require to be watched with the closest attention, and not without some degree of jealousy.

HEWETT V. ATLAN. THE "ATLAS" 1

77. Where salvage is finally effected, those who meritoriously contributed to that result are entitled to a share in the reward, although the part taken by them would not of itself have produced the result.

78. If success in a salvage operation is finally obtained, no mistake or error of judgment in the manner of procuring it, no misconduct, short of that which is wilful and may be considered criminal on the part of the salvors (which must be proved by those who impute it), will work an entire forfeiture of the salvage.

79. Mistake or misconduct, other than criminal, which diminishes the value of the property salvaged, or occasions expense to the owners, is properly to be considered in the amount of compensation to be awarded.

SIR JOHN T. COLERIDGE, p. 338: — In a certain sense the general propositions here laid down are undoubtedly true; if the ship or cargo be not saved there can be no salvage, and if this result follow from the miscarriage or the misconduct of an agent employed by those who claim as salvors, however great or meritorious their exertions may have been, they are identified with their agent for this purpose, and their claim entirely fails. But their Lordships are compelled respectfully to differ from the learned judge in his application of these principles to the facts of the present case. Here the ship and cargo have been saved, and it is not denied that this result is in a great measure attributable to the very meritorious exertions of the plaintiffs, in the course of these exertions, and when the safety of the ship was near its accomplishment, it may be taken, for the sake of argument, that, by their agent's misconduct or mismanagement, an untoward interruption was occasioned; and that the danger of the vessel and cargo to a certain extent temporarily revived, but they never abandoned their endeavours to save her; that which without their authority and against their will was done by others, might and would have been done by themselves, and if it had been, it cannot be conceived that their claim for compensation could have been resisted in its entirety on the ground of the misconduct which has now been held fatal to it. The course which their Lordships will have to recommend to Her Majesty in this case, will rest on two propositions. The first is this: that where a salvage is

1 Admiralty, 1862 July 9, XV Moore 329.

WHEN DUE.

finally effected, those who meritoriously contributed to that result are entitled to a share in the reward, although the part he took, standing by itself, would not in fact have produced it.....

P. 340 :—This introduces the second proposition—that when success is finally obtained, no mere mistake or error of judgment in the manner of procuring it, no misconduct short of that which is wilful and may be considered criminal, and that proved beyond a reasonable doubt by the owners resisting the claim, will work an entire forfeiture of the salvage. Mistake or misconduct other than criminal which diminishes the value of the property saved, or occasions expense to the owners, are properly considered in the amount of compensation to be awarded. Wilful or criminal misconduct may work an entire forfeiture of it; but that must be proved by those who impute it. The presumption, of course, is in favour of innocence, and this rule applies so strongly in favour of salvors that the learned judge of the Admiralty, in the case of the "*Charles Adolphe*" (Swab, 153), has laid it down that the evidence must be conclusive before they are found guilty; by which he must be understood to mean that it must be such as leaves no reasonable doubt in the mind of the judge.

CLEARY v. McANDREW. THE CARGO *ex* "GALAM" ¹

80. The "*Galam*" having on board a cargo became unseaworthy and put into a port. The "*Mary-Jane*" was chartered to proceed in ballast and to fetch home the cargo. As the carrying on of the cargo was essential to make it available, either for the holder of the *Respondentia Bond* or anybody else, it was to be considered as salvage service.

BLIGH v. SIMPSON. THE "FUSILLIER" ²

81. Before the *Merchant Shipping Act*, no salvage was awarded when lives only were saved, property must have been saved to entitle salvor to anything, but under the last mentioned Act, salvage may be granted where lives only have been saved either by passengers on board the ship or by the master or crew.

LORD CHELMSFORD, p. 70 :—The principal question in the case is one of great importance, and of some difficulty. Prior to the passing of "*The Merchant Shipping Act, 1854*," the Court of Admiralty, in a case of salvage where no property had been rescued from peril, but where life had been saved, had no power to award anything to the salvors. But where both property and life had been saved, it was the well established practice of the court to increase the amount of salvage, and thus indirectly remunerate the salvors for the merit due to their having saved life as well as property. Of course, as the salvage was awarded in one entire sum, the owners of the cargo, as

¹ Admiralty, 1863 July 27, II Moore N. S. 216.

² Admiralty, 1865 Feb. 9, III Moore N. S. 70.

WHEN DUE.

well as of the ship and freight, contributed their proportion to the payment of this increased salvage, and so in a certain sense were rendered liable to the payment of what is called life salvage.

THE "SAPHO"¹

82. Where salvage services are performed by one ship for another, both ships belonging to the same owners, the master and crew of the ship which has performed the salvage services are entitled to salvage remuneration, provided the services performed are not within the contract which they originally entered into with the owners, and for which they would be paid for by their ordinary wages.

LORD JUSTICE MELLISH, p. 71:—It is quite clear that, as a general rule of law, seamen cannot recover salvage remuneration for services which by their contract they are bound to perform, and, therefore, they never recover salvage remuneration for services connected with the saving of their own ship, as long as the relation of master and servants between them and their owner, with reference to that ship, continues. But it has never been laid down, and their Lordships are not disposed to lay down, that if a seaman perform services for the benefit of his owner which are not within his contract, he cannot be entitled to salvage remuneration. Their Lordships do not say services which he is not bound to perform, because it may be that as an ordinary incident of a voyage, if a ship meets another ship in distress, and the master orders the seamen of his ship to give assistance, they are to a certain extent bound to give assistance; but then for that assistance, if salvage services are rendered, they are entitled to receive salvage remuneration. Their Lordships do not see why the case should be different if it turn out that the ship to which the service is rendered belongs to the same owner. The ordinary contract which a seaman enters into certainly says nothing about rendering services to another ship. He does something, therefore, which is not within his contract. It may be that he ought to do it because it is an ordinary incident that he should do it; but then if it is an ordinary incident that he should do it, and if he does it, not because it is within his contract, but for the reason Lord Stowell assigns in the case of *The Waterloo* (2 Dod. 437), where he says: "It is the duty of all ships to give succour to others in distress; none but a freebooter would withhold it;" if he performs that duty towards a ship, though it may be belonging to the same owner, because of that moral duty, and not because it is within his original contract of service with his owner, there does not appear to be any good reason why the ordinary consequences should not follow, namely, that for this extraordinary service he should receive the remuneration which the law gives him. That appears to be in accordance with the ordinary rules laid down by Lord Stowell, and all the great authorities respecting salvage, that it is a right very

¹ Admiralty, 1871 June 15, VIII Moore N. S. 63.

WHEN DUE.

much favoured in the law, and, therefore, that it ought not to be narrowed in a case which clearly comes within the principle. Indeed, the learned counsel for the appellants appeared to admit that if a man risked his life, that being a thing he was not bound by his contract to do, he would be entitled to receive salvage remuneration; but their Lordships do not see on what principle a distinction can be drawn between a case where a seaman risks his life and a case where he performs other extraordinary services which would in their nature be salvage services. That would be raising a new distinction, for which there appears no sufficient ground or authority. The true rule appears to their Lordships to be, to consider whether the services are in themselves of the nature of salvage services; and next, whether they are services which are within the contract which the seaman originally enters into, so that he receives remuneration for them by his ordinary wages? If they are not within his contract, and he does not receive remuneration for them by his ordinary wages, and they are in their nature salvage services, their Lordships are of opinion, that there is no good reason why the seaman should not receive the ordinary salvage remuneration which the law gives him.

THE "GOLDEN LIGHT" AND THE "ANNAPOLIS" ¹

83. While a steam-tug was engaged to tow the ship "Annapolis," two other ships came into collision with the ship, and other dangers were also incurred in course of which the tug to save herself let the "Annapolis" go, but afterwards took her again and resumed the towage, assisting at the same time the two other ships. After the salvage was effected, the tug claimed salvage from the three.

Their Lordships refused salvage with regard the "Annapolis"; for although the tug had the right to let the ship "Annapolis" go, to save herself, yet she was bound to return with due speed to resume her towage, and in this case the tug did no more than her towage contract bound her to do. But as regards the other ships, she was entitled to salvage.

LORD KINGSDOWN, p. 38:—It appears to their Lordships that it would be dangerous to hold that if salvage service be actually rendered to a ship, she cannot be called upon to pay anything unless it can be shown that she either requested or expressly accepted assistance. In many cases the urgency of the case may be too great to admit of previous discussion, and if a salvor were required to prove such agreement before he could recover, it is to be feared that there would be much slackness in cases which most require energy and activity. They agree with what they understand to be the opinion of the learned judge below, that it is sufficient if the circum-

¹ Admiralty, 1861 August 2, V Law Times N. S. 37.

WHEN DUE.

stances of the case are such that, if an offer of service had been made, any prudent man would have accepted it.

TURNBULL V. THE OWNERS OF THE SHIP "THE STRATHNAVER" ¹

84. In a suit in which salvage services were claimed, it was proved that the defendant's vessel, at the time such services were rendered, was neither in actual nor imminent probable danger. The Judicial Committee held that salvage services could not be demanded, but as she was safely towed into port, those services must be regarded as towage.

SCHOOL**ENDOWED SCHOOLS ACT.***In re ALLEYN'S COLLEGE DULWICH ²*

85. The master of a college holding an office created and defined by statute has a vested interest in his office, and any scheme on the part of the charity Commissioners for his dismissal must save and compensate such interests and emoluments.

In re SHAFTOE'S CHARITY AT HAYDON BRIDGE ³

86. Under the *Endowed Schools Act*, sects. 13 and 39, persons sending their children free of payment to a public school, have no right to appeal against a scheme obliging them to pay a reasonable charge.

SCIRE FACIAS

See WRIT OF PREROGATIVE: iislem verbis.

SEIGNIOR**CORPORATIONS.****THORNTON V. ROBIN ⁴**

87. The owners of fiefs and lordships in Jersey are entitled to fines on the death of tenants holding lands under them, and to forfeitures on tenants being convicted of crimes. If any of the lands are conveyed to any corporation, the lords lose their rights, but compensation must be made to the lords for the loss of the fines and forfeitures, which they would have received on the death or conviction of their former tenants.

¹ Vice-Admiralty, 1875 Dec. 8, L. R. I Appeal Cases 58.

² England, 1875 June 27, L. R. I Appeal Cases 68.

³ England, 1878 June 6, XXXVIII Law Times N. S. 793.

⁴ Jersey, 1837 June 19, 1 Moore 439.

RIGHTS OVER UNNAVIGABLE RIVERS.

ST. LOUIS V. ST. LOUIS¹

88. The *seigneur* in Lower Canada has the right to the use of an unnavigable river flowing through his land; and the *co-seigneur* cannot divert for his use the waters, which have for eleven years supplied the mills of another of his *co-seigneurs*.

See FEUDAL TENURE, PRESCRIPTION.

SEA COAST

PROPERTY OF ROCKS ON

BENEST V. PIPON²

89. A person cannot claim the exclusive right on rocks situate below low water mark on the sea coast except by a grant from the king, or by such long and undisturbed enjoyment of it as to give him a title by prescription.

LORD WYNFORD, p. 67:—The rocks where the sea-weed grows, which was the subject of the action in the court of Jersey, are covered with the ordinary tides. The sea is the property of the king, and so is the land beneath it, except such part of that land as is capable of being usefully occupied without prejudice to navigation, and of which a subject has either had a grant from the king, or has exclusively used for so long a time as to confer on him a title by prescription. In the latter case a presumption is raised that the king has either granted him an exclusive right to it, or has permitted him to have possession of it, and to employ his money and labour upon it, so as to confer upon him a title by occupation, the foundation of most of the rights to property in land. This is the law of England, and the cases referred to prove that it is the law of Jersey

This rule of law is derived from a universal principle of convenience and justice. What never has had an individual owner belongs to the sovereign within whose territory it is situated. Whatever any sovereign has allowed an individual to possess or improve he cannot take from that individual, because by thus doing he would take from the occupant the value of the labour which he had been permitted to expend on the property, and which must far exceed the original value of the soil.³

SEPARATION

ALLOWANCE TO WIFE.

WESTMEATH V. WESTMEATH³

90. In an action for separation from bed and board, when the court grants an allowance to the wife, the husband is not entitled to have deducted from the amount allowed

¹ Lower Canada, 1841 Feb. 18, III Moore 398.

² Jersey, 1829 July 9, I Knapp 60.

³ Canterbury, 1834 Nov. 13, II Knapp. 42.

ALLOWANCE TO WIFE.

whatever she has received by will since the marriage, nor whatever she receives as salary as a Lady-in-waiting to the Queen ; but a pension from the crown granted to the wife may be taken into consideration.

FROM BED AND BOARD.SANT V. SANT ¹

91. The grounds for an action in separation from bed and board under the words *injurie gravi* are left to the discretion of the court. The following remarks of their Lordships give a construction of these words.

SIR JAMES HANNEN, p. 546 :—Their Lordships consider that, under the words "*injurie gravi*" it was intended to leave a large discretion to the tribunal having to judge the facts; that not only acts but words designed to wound the feelings of the wife—where, as in this case, she is the complaining party—may amount to "*injurie gravi*"; that in considering this question, the position of the parties, the habits and usages of the society in which they live, must be regarded; that insults offered to the wife, which manifest contempt of her in that character, are of special gravity, and that that gravity is increased if the insult be offered in the presence of others; that wrongs of this description are not to be estimated separately, but in combination one with another.

OF PROPERTY.LEMPRIÈRE V. VIBERT ²

92. By the custom in Jersey, derived from that of Normandy, a widower, who has had a child born alive by his wife, is, whether the child survive its mother or not, entitled after the death of his wife to a life interest in her real property.

93. A separation as to property between husband and wife, voluntarily obtained, does not affect the husband's "*droit de viduité*."

SERVITUDE**INDIVISIBLE** See PRESCRIPTION : *iusdem verbis*.**REPAIRS OF ROAD.**DORION V. LE SÉMINAIRE DE ST. SULPICE DE MONTRÉAL ³

94. By a seigniorial deed executed in 1804, certain land was granted to Smith, subject to the obligation that part of it was to be used for a road, which the grantee was to make and keep in repair, the grantors being primarily

¹ Malta, 1874 May 16, L. R. V P. C. 542.

² Jersey, 1862 June 18, XV Moore 427.

³ Quebec, 1880 Feb. 10, L. R. V Appal Cases 362.

REPAIRS OF ROAD.

liable to the municipal authorities in respect of such repairs. The land was fifty years later sold by the sheriff to the appellant who refused to repair the road.

The Privy Council decided that such obligation created a real servitude within the meaning of art. 499 of the Civil Code, and that the sheriff's sale did not discharge this servitude, and that the grant of land for the purpose of opening a front road, included on the part of the grantee the obligation to make and repair the road.

SIR MONTAGUE E. SMITH, p. 362:—In considering this question, the provisions of the Civil Code of Canada which define and enumerate servitudes, are to be regarded. Article 499 of that Code defines generally a servitude: The obligation to repair a road imposed on one estate for the benefit of the owners of another would, *prima facie*, seem to be a charge within the terms of this article. No doubt by the old French law founded on the Roman law, and by the law of Canada before the Code, a servitude was understood to be that the owner of the servient tenement was only to suffer, and not to do any act. It is unnecessary to cite any authorities on that subject, because the old law is clear, and may be taken to be correctly stated by *Toullier* (3d Vol.) in Nos. 377 and 378, which are cited by Mr. Justice Bélanger in his judgment. *Toullier's* observations on the maxim: "*Servitutum non ea natura est ut aliquid patiatut aut non faciat.*" It is admitted by writers on the French Code, which contains a definition and enumeration of servitudes similar to those found in the Canada Code, that the principle of the old law has been invaded, and that under the code some active servitudes may be imposed upon land. But they qualify of the admission by affirming that only such active servitudes as are auxiliary to servitudes in their strict meaning are contemplated by the Code. (C. C., Articles 553-554; *Demolombe*, Vol. XII, Nos. 871-873).

369:—So that one of the servitudes which may be imposed by law is the construction and the repair of roads. Can a servitude of a like nature be created by contract? Their Lordships think it is unnecessary to determine the question in this naked form, because they are of opinion, for the reason above given, that the obligation to make and repair the road formed part of an entire servitude, to allow the use of land for the purpose of a front road (a use in which the owner on the opposite side was interested) and to make and repair the road.

TRANSFER OF

STEELE V. THOMPSON¹

95. The agreement to sell part of an immoveable, providing that a canal running across the land should be for the use of both the seller and the buyer, creates a servitude of the

¹ British Guiana, 1860 Feb. 2, XIII Moore 280.

TRANSFER OF

character of an immoveable, and which can only be transferred, according to the Roman-Dutch law, before a judge.

WATER-COURSE.

FRÉCHETTE v. LA CIE. MANUFACTURIÈRE DE ST. HYACINTHE ¹

96. The proprietor of a higher land who has constructed works accumulating the waters of the river into a small place, increasing thereby the depth of the river, and diverting the waters from their natural course, aggravates the servitudes upon the lower land, against the provision of article 501 of the Civil Code.

97. Under these circumstances, the proprietor of the higher land cannot prevent the proprietor of the lower land from constructing a dam for his protection, to the extent of the artificial accumulation of the waters, and cannot demand a free course for the water sent down by his works. *Saunders v. Newman*, 1 B. & A. 258; *Tapling v. Jones*, 11 H. L. C. 290.

SIR ARTHUR HOBHOUSE, p. 179 :—The appellant's counsel contended strongly at the bar that the working of the plaintiffs' mill has not been impeded or only impeded to a slight extent, and that the defendants have been materially injured by the abstraction of water. But their Lordships did not think it necessary to hear the respondent's counsel on those points. For the right to resist interference with a natural flow of water, or a flow legally established, is independent of the actual user of the water. Neither would the plaintiffs' right to have the established flow protected be barred by the mere fact that the defendants may have been injured by deprivation of water owing to the extension of Dyke No. 1. That might give the defendants a right to sue for damages, or to remove the dyke; but it does not follow that they can interfere with the established flow from the plaintiffs' land.

The appellant's counsel also insisted strongly that the action is wrong in form, but their Lordships see no reason to differ from the two Quebec Courts on this point.

The question whether Chapter 51 of the Consolidated Statutes does not confine the plaintiffs to a single remedy, viz., that of pecuniary damages, is a more substantial one. There is certainly great difficulty in so construing the Code and the statute as to produce a clear and harmonious result for the whole. There is nothing on the face of the statute itself to limit the generality of the powers it appears to confer on riparian owners. It was stated at the bar that there had been a course of decision in Canada which had the effect of placing a limit on the general terms of the statute. But the only case cited, that which is stated in the respondent's factum filed 11th May, 1881, appears only to refer to the mode of ascertaining dam-

¹ Quebec, 1883 Nov. 34, L. R. IX Appeal Cases 170.

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ages. And the Judges in the Lower Courts do not refer to any course of decision, while they entertain a great diversity of view as to the limits within which the statute is to be construed. The Superior Court appears to think that the statute is no answer to actions founded on common right and on actual injury. Mr. Justice Ramsay, while impugning both the motives and the capacity of the framers, thinks it means nothing more than that if and when damages are sued for they shall be ascertained by referees. The rest of the Court in one passage express an opinion that the statute was not intended to operate against those who had turned running waters to use, and in another, that it was intended to operate only against land owners and not against millowners. It is difficult to find the foundation for any of these limitations. At the same time, their Lordships find it difficult to suppose that by the saving of the statute contained in Sect. 503, the Code intended to give no remedy whatever beyond pecuniary compensation for any violation of its rules. The question was very ably argued at the bar, but in the result their Lordships do not find it necessary to pronounce any opinion on it.

The substantial difficulty in the way of the plaintiffs is this: that they are seeking to establish a new and different servitude, the act of man without either grant or recognition; that they have not alleged or proved what was the precise servitude which existed prior to 1878; and that the decree which they have obtained proceeds on the assumption that the existing state of things is the natural state, or at least that there is identity between the state of things before and after the plaintiffs' operations of 1878. This is the difficulty to which the attention of their counsel was specially called, and to see how it stands it is necessary to examine the proceedings with some particularity.

In the declaration filed by the plaintiffs, they set forth their documents of title, and allege that they have had for upwards of 62 years the rights, privileges and water powers *actually used by them*. They pray for a declaration of those rights, for a declaration that the defendants have illegally disturbed the enjoyment of them, and for demolition of defendants' barrier. It is clear then that, so far, the plaintiffs make no distinction between the existing flow of water and the established flow.

The defendants on their part rely on the alterations of 1878. They say in substance that the mischief is caused by the plaintiffs' own works executed below Mill No. 1 in the preceding spring and summer; that the extension of Dyke No. 1 has caught all the water and carried it down to Mill No. 1; that by collecting so large a quantity of water into the narrow space on the left bank, the plaintiffs have themselves to blame if at that point the water is more abundant than they like; and that they have no grant (*titre*) giving them a right so to use the river.

In replying to these defences the plaintiffs do not fall back on their right to the natural or the established flow of the water. As regards their works below Mill No. 1, they say that the defendants' allegations are false in fact. And as to all their recent operations, they say that their only object has been to preserve the water and

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conduct it from one of their mills to another, *as they have always done.*

At the wish of both parties experts were appointed by the Court to report upon instructions given to them by the Court. They were to state :—

1. The conditions of the localities and of the erections described in the writings of the parties, both before and after the said erections.
2. The works of the defendants.
3. The nature of those works, and whether they are calculated to injure the working of the water power used by the plaintiffs before they were completed.
4. What should be done so that each party may use the water without injury to the other.
5. What amount of damages, if any, should be paid by the defendants to the plaintiffs.

These instructions are not pointed to the effect of the plaintiffs' operations, but rather indicate that the only question is whether the flow existing at the time of the defendant's operations has been impeded.

In answer to the first and second questions the experts show the construction of the old and new mills to the effect hereinbefore stated, but they say nothing about the extension of Dyke No. 1, nor do they show what was the former flow of the water, or the bed of the river, or in any other respect what was the state of the localities prior to the execution of the recent works of the plaintiffs. In answer to the third question they find that the defendants' new barrier bays back the water to the depth of about two feet at the boundary line, Point A. In answer to the fourth question they find that the defendants ought to lower their barrier 22 inches, so as not to bay back the water at all over Point A. And they award \$100 for damage.

The parties then went into evidence, and the cause came on for hearing before Mr. Justice Sicotte, Judge of the Superior Court. That learned Judge gave the plaintiffs a decree in precise accordance with the opinion of the experts. The decree is founded on recitals showing that the plaintiffs have been in possession of a real right for a year and a day, using the upper waters and letting them escape over the land of the defendants. Then it states that the barrier raised by the defendants has obstructed the waters *in their natural course such as it was formerly.*

It is clear then that the Superior Court paid no attention to the alteration effected by the plaintiffs' works in 1878. The recital of possession for a year and a day is true of the prior state of things, but is not true of the existing state of things. Nor is the present course of the water its natural course, nor such as it was formerly.

On appeal to the Queen's Bench, there was a difference of opinion among the Judges. Mr. Justice Ramsay states very clearly the point of the defence which is now under discussion. He says, "The defendants answer that they have not stopped the natural flow of the water, but that plaintiff has, by increasing his own works

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"above, directed the waters of the river of their natural course, and so created an artificial accumulation of water which can only "escape through the tail race." He thinks this would be a good defence if it were not for the acquiescence or recognition of the defendants. But there is no evidence of such acquiescence in the plaintiffs' works of 1878. The evidence referred to by Mr. Justice Ramsay consists of two acts. First, the construction by the defendants of Dyke No. 3, which was long prior to the extension of Dyke No. 1. Secondly, the construction of the works now complained of. But in the first place, though it is true that by their new works the defendants sought to take advantage of the new flow of water, they did so because their former flow was partially cut off. And in the second place an act can hardly be treated as acquiescence in favour of a person who has ever since been contending against it. It is at the utmost acquiescence on condition of enjoying the thing acquiesced in, and if that condition is taken away, so is the acquiescence.

Having thus disposed of the defence founded on the extension of Dyke No. 1, Mr. Justice Ramsay addresses himself to the question of damage. He thinks that there is no sufficient evidence of damage, and would either dismiss the action or remit it for further report by experts.

The opinion of the rest of the Court was delivered by Mr. Justice Tessier. That learned Judge states the defendants' plea that the plaintiffs themselves have caused the mischief complained of, but he thinks it completely answered by the report of the experts in answer to the 3rd question. Now that question and answer relate only to the existing flow of water, and have absolutely no bearing on the prior question whether the plaintiffs are entitled to have that flow protected. Mr. Justice Tessier then quotes Art. 501 of the Code, and says that the Company have not added anything to the volume of the water by the hand of man, because they have not introduced any foreign water into the Yamaska. On these grounds the Court decides for the plaintiffs, and dismisses the appeal.

It is true, indeed, that the plaintiffs have not increased the whole volume of the Yamaska, but they may have accumulated the waters of that river into a small space, and so have increased their depth at the point where they complain of it, and have augmented the servitude they desire to enforce. This is the very thing which the Court of Queen's Bench appear to think would be material if only it had been done by introducing fresh water into the Yamaska, instead of being done by a readjustment of the waters of the Yamaska itself. That it must have been done to some extent seems evident from the plan, and the respondents' counsel so admitted. It results also from the evidence given by Bertrand and by Delisle, showing how the water which used to flow to the right of Dyke No. 1 now flows to the left. The plaintiffs have left the point untouched by evidence. Whether the difference is much or little has not been ascertained. By Sect. 501 of the Code, the proprietor of the higher land can do nothing to aggravate the servitude of the lower land. The plaintiffs have certainly accumulated the volume of the water, and have probably increased its depth in the narrow channel up to the dividing line.

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To that extent they are aggravating the servitude of the lower land, and to that extent at least they have no right to demand, as they do demand, a free course for the water sent down by them. That the matter is left in this uncertainty is the fault of the plaintiffs who are bound to allege and prove a case entitling them to relief. They come into Court insisting on their right to keep unobstructed the flow of water which they say has existed as it now is for more than 60 years. The issue is distinctly raised that the existing flow is not the ancient one; but they continue to insist that it is, and refuse to shape their case so as to try the question whether or not they are really entitled to some relief on the ground that the established flow had been interfered with, and to get that amount of relief. It is unsatisfactory to dispose of a case on such grounds, but their Lordships cannot see by what right the defendants are to be compelled to keep their dam so low that the whole volume of water, as accumulated and increased by the plaintiffs, shall run away unobstructed.

It is not easy to find decisions precisely applicable to such peculiar circumstances; but their Lordships have not been referred to and are not aware of any case in which the plaintiff has obtained relief in respect of any servitude except that to which he has clearly alleged and proved his right.

In *Saunders v. Newman*, 1 B. & A. 258, the plaintiff had acquired a prescriptive right to an artificial flow of water. All he had done within recent times was to alter the construction of the wheel turned by the water. It was held that the defendant, a lower proprietor, had no right to obstruct the ancient flow; but it seems clear from the observations of the Judges that the decision would have been otherwise if the plaintiff's operations had substantially altered the flow of the water. Abbott, J., says, "When a mill has been erected upon a stream for a long period of time, it gives to the owner a right that the water shall continue to flow to and from the mill in the manner in which it has been accustomed to flow during that time. The owner is not bound to use the water in the same precise manner, or to apply it to the same mill. If he was, that would stop all improvements in machinery. If indeed the alterations made from time to time prejudice the right of the lower mill, the case would be different; but here the alteration is by no means injurious, for the old wheel drew more water than the new one."

Tapling v. Jones, 11 H. L., 290, was cited as an authority for the plaintiffs; but so far as it bears upon the point under discussion it favours the argument for the defendants. For the plaintiff in *Tapling v. Jones* succeeded in getting protection for nothing but his ancient light; those very rays of light to which he had acquired an indefeasible right. Lord Westbury says:—"In the present case an ancient window in the plaintiff's house has been preserved, and remained unaltered during all the alterations of the holding. . . . The appellants' wall, so far as it obstructed the access of light to the respondent's ancient unaltered window, was an illegal obstruction." And Lord Chelmsford, in answering the argument that the alteration of windows had changed the character of the right so as to destroy it, says, "But it is not easy to comprehend how this effect can be

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"produced by acts wholly unconnected with an ancient window which the owner has carefully retained in its original state."

It may be inferred from these judgments that, if the plaintiff in *Tapling v. Jones* had so mixed up his old lights with his new ones that they could not be distinguished, he would have failed. It is true that in that case the protection given to the ancient light carried with it incidentally protection to the new lights. But the only reason why it did so was that the new lights could not be obstructed without obstruction to the ancient light. New lights are no encroachment, nor did the plaintiff's decree aggravate the defendant's servitude, for he was only prevented from building so as to obstruct the ancient lights. In the case of an augmented flow of water the servitude of the lower proprietor is aggravated.

The result is that the plaintiffs have insisted on an enjoyment to which they have shown no legal title, and have not proved or even alleged any case for relief in respect of that enjoyment to which they may have had a title. Their Lordships have anxiously considered whether it is possible usefully to remit the case to be tried on the true issues. They are, however, convinced that an attempt to do so will not save time or money, and that the litigation must follow the strict course. They will humbly advise Her Majesty to reverse the decrees below and to dismiss the action with costs. The costs of this appeal will follow the result.

See CROWN LANDS: *eodem verbo*.

SHERIFF**CHANGE OF PLACE OF CONFINEMENT.**

HAINES V. EAST INDIA COMPANY¹

98. When a creditor who had his debtor imprisoned for debt, allowed him to go out of prison for a temporary purpose, the custody continues, as the sheriff may refuse to let the prisoner go out, unless ordered by a rule of court; thus if, without any rule of court, all parties including the sheriff agree to the debtor leaving the prison, and from a laxity of surveillance of the sheriff's officers, the debtor escapes, it is a question of fact for the jury, if the judgment creditor brings an action against the sheriff, whether the judgment creditor did not himself contribute to escape. But if the sheriff alone, on the ground of the debtor's ill-health, take upon himself any relaxation of the imprisonment, by letting the debtor go or reside out of prison, it would be an escape.

99. If a creditor of an imprisoned debtor discharged him, even if it be only for a temporary time, and even if the debtor, had agreed that if he did not pay the debt within a certain time, he would again be reconstituted a prisoner, he cannot afterwards retake him.

¹ Bombay, 1856 Dec. 2, XI Moore 39

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100. But a creditor may consent to the changing of the place of confinement of his imprisoned debtor, and to relax the rigour of imprisonment, without discharging the debtor from his debt.

THE RIGHT HON. SIR JOHN PATTERSON, p. 53 :—A question was argued before the Court of Bombay, and has been urged here, as to what will be the consequence to the sheriff upon the question of escape ; but really that is not the question in the case. There cannot be the slightest doubt that if these circumstances had taken place by the authority of the sheriff alone ; if he, upon the representation that the defendant was suffering very severely in health, had taken upon himself to make this relaxation of imprisonment, and had permitted the defendant, accompanied by ever so many of his officers, to go and reside in a house of his own, it would have been an escape. There can be no question at all about it ; and why ? Because the sheriff having taken a party in execution under a *capias ad satisfaciendum*, is bound to keep him in his own gaol, he cannot of his own authority allow the prisoner to make a gaol for himself ; he is bound to keep him *in arcta et salva custodia*, in order to enforce payment of the debt, and if he relax that *arctam custodiam* at all, so far the pressure to compel the payment of the debt is relaxed also, which the sheriff has no right to do. Upon that principle it is, that where the sheriff had suffered a man to go out of gaol, even in the custody of one of his officers, or as in the case of *Benson vs. Sutton* (1 Bos. & Pull. 24), he had suffered him, before he was taken to gaol, to go away from the lock-up house in the custody of one of his officers, it was held to be an escape. Whether it was going at large again, or not, may be quite another question, with respect to the mere words "going at large" ; but it constituted an escape so far as the sheriff was concerned, and entitled the plaintiff, if he thought fit, to bring an action against the sheriff for that escape. Formerly he would have recovered the whole amount ; latterly the law has been altered, and he would recover damages only : but that is immaterial.

There is no doubt, therefore, that the sheriff, of his own authority, could not have done this act. But then look to the peculiar circumstances of the case. The plaintiff in any case, in order to be barred from continuing his execution, and from having the benefit of his judgment, must voluntarily discharge the defendant out of custody. If he does discharge him out of custody, I agree that if it be only for a week, he cannot, by any agreement which he may have made with the defendant, afterwards retake him, although the defendant may possibly have agreed that, if he does not pay the money within a week, he shall be retaken. That is decided law.

Page 60 :—The creditor may, under certain circumstances, or if he feel it to be really material and important to the debtor, change the place of imprisonment, and relax somewhat the rigour of imprisonment, without discharging the debtor from his debt, it clearly not being the meaning of either party that any such discharge should take place.

CHANGE OF PLACE OF CONFINEMENT.

I should observe, that this opinion must not be taken to go the length of supposing that it would be possible, for instance, for a plaintiff to say to a defendant, "Oh, you may go about just where you please, but it shall be considered that you are in custody;" because that would be a fallacy and an absurdity: but here was an actual removal from the gaol to a private house, and an actual custody of some sort continuing, which was intended to continue as a *bonâ fide* custody, as far as we can judge from all the circumstances of the case.

RESPONSIBILITY OFBRASYER V. MACLEAN¹

101. A sheriff is liable, without proof of malice or want of probable cause, in an action for a false return of rescue made by him upon a writ of *capias*, for the damage which resulted to the plaintiff therefrom. Such return was conclusive at that stage of the proceedings as to the truth of the alleged rescue by the plaintiff, whom it rendered liable to attachment for a contempt of court without his being allowed to shew that the facts returned were untrue; and constituted a misfeasance by a public ministerial officer in the discharge of his duties.

USE OF VIOLENCE.AGA KURBOOLIE MAHOMED V. THE QUEEN²

102. A sheriff's officer with a writ of *capias* peaceably obtained entrance by the outer door, but before he could make an actual arrest, was forcibly expelled from the house, and the outer door fastened against him. Thereupon the officer obtained assistance, broke open the outer door, and made the arrest.

The Judicial Committee held, that the officer was justified in so doing, and that demand of re-entry, under such circumstances, was not requisite to justify his breaking open the outer door.

LORD CAMPBELL, p. 246:—There is no doubt that, a man's house being his castle, the ordinary rule is, that the outer door cannot be broken open to execute civil process; but it is admitted here, that if the prosecutor had been arrested, and had then expelled the defendants from his house, they might have broken open the outer door to enter and re-take him; and their Lordships think that as they had once been lawfully in the house, and he knew that they were lawfully about to arrest him, and he unlawfully caused them to be expelled for the purpose of preventing them from so doing, he cannot be permitted to take advantage of his own wrong, by thus defeating the process of the law; and that they had a right to place

¹ N. S. Wales, 1875 June 10, L. R. VI P. C. 399.

² Calcutta, 1843 June 17, IV Moore 239.

USE OF VIOLENCE.

themselves in the position which they occupied when his unlawful act began. Without an actual arrest, there was no rescue or escape; but the proposition that till an actual arrest had taken place, the prosecutor might forcibly expel the officer and those acting in his aid, and lock the outer door, so as to entitle himself to the protection of his castle, cannot be supported. The outer door being open, they were entitled to enter the house under civil process; and they being lawfully in the house, to arrest him, he was guilty of a trespass by expelling them. The act of locking the outer door was unlawful, and he could confer no privilege upon himself by that unlawful act.

Again, there is no doubt that, generally speaking, before an outer door can be broken open, even to execute criminal process, there must be a demand of entry, and a refusal. But to what extent? to inform the owner of the house of the purpose for which the entry is to be made, and to afford him the opportunity of opening the door and personally admitting the parties who are to execute the process of the law. Here the prosecutor, who had just expelled the defendants from his house, that they might not arrest him, full well knew the purpose for which they returned, and he showed a determined resolution to oppose their admission. While he was firing pistols at them, were they to knock at the door, and to ask him to be pleased to open it for them? The law in its wisdom only requires this ceremony to be observed when it possibly may be attended with some advantage, and may render the breaking open of the outer door unnecessary.

SHIP AND SHIPPING

See AFFREIGHTMENT, COLLISION, MERCHANT SHIPPING, BOTTOMRY AND RESPONDENTIA.

SIGNATURE

See EVIDENCE.

SLANDER**DEFAMATORY WORDS.**

SIMMONS v. MITCHELL ¹

103. Words susceptible of two meanings, one being an imputation of suspicion only, the other of guilt, must be left to the jury, but words of suspicion only cannot sustain an action in damages, especially when the plaintiff does not allege in any of his innuendoes that the words of which he complains were spoken with the intention of imputing a crime.

HARRIS v. DAVIES ²

104. An action for slanderous words spoken is placed upon the same footing, as regards costs and other matters, as an

¹ Grenada, 1880 Nov. 26, L. R. VI Appeal Cases 156.

² N. S. Wales, 1855 Feb. 12, L. R. X Appeal Cases 279.

DEFAMATORY WORDS.

action for written slander, by 11 Vict. No 13 which repealed 21 James 1, c. 16, s. 6.

DAMAGING STATEMENTS. See DAMAGES : *iisdem verbis*.

SLAVE TRADING

See EVIDENCE : *Slave Trade Act* ; INTERNATIONAL LAW : *iisdem verbis*.

ONUS PROBANDI

BARTON ET AL. V. THE QUEEN ¹

105. The *onus probandi* is on the prosecutor who is benefited by the seizure of a vessel under the Slave Abolition Act, and he must establish all the facts necessary to constitute liability to penalties.

RESPONSIBILITY.

DEL CAMPO V. THE QUEEN ²

106. When a vessel is making the trade of slaves, it is considered the joint act of the master of the ship and the owner, and both are liable jointly and severally.

RIGHTS OF CAPTORS.

JENNINGS V. HILL. THE "AUGUSTA" ³

107. Under the statute Geo. IV, ch. 113, sect. 44th, the captors of a vessel seized in violation of the Slave Trade Act, are only entitled to half of the proceeds of the sale of the ship, after deducting the costs of prosecution.

SOLICITOR

See ATTORNEY

STAMP

TAXATION BY STAMP DUTY. See LEGISLATURE : *legislative powers : eodem verbo*.

STATUTES**CONSTRUCTION OF**

CHRISTIAN V. GOLDIE ⁴

108. Where there is doubt or ambiguity in a statute, the preamble which forms part of the act, assists in finding the intention of the enactment, but where there is no doubt, the preamble does not control the words of the act.

LORD BROUGHAM, p. 240 : — According to all rules of construction, if any ambiguity hangs over the enacting part, resort is had to the

¹ Gibraltar, 1840 Feb. 7, II Moore 19.

² Gibraltar, 1837 July 5, II Knapp. 15.

³ Sierra Leone, 1844 Feb. 14, Moore 369.

⁴ Isle of Man, 1838 Feb. 15, II Moore 240.

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preamble, and finding from the preamble what the intention of that measure was, you then construe the enacting part, which, but for that, would be ambiguous, giving to it that meaning which the preamble sanctions. But when there is no doubt whatever in the enactments, the preamble is not to be left to control the words and to confine their operation, if they plainly and without any implication, by direct meaning and intendment, give to the section a larger scope.

This is the rule with respect to all acts of Parliament. There are various instances perfectly well known, where the legislature has enacted provisions to which no reference is made in the preamble. There are also cases where penal enactments have been intended to apply to one class of the community, but by the mode in which they have been enacted, they have been applied to another. But still though that is seen when these enactments come under the view of courts of Justice, they must, nevertheless, give them the legal intendment, and assume the legislature to have meant what they have actually said.

CRAWFORD V. SPOONER¹

109. Statutes should be construed according to their terms and under the ordinary rules of construction whatever may be the consequence.

110. If the Legislature makes laws which are contrary to what it intends to do, the court cannot supply a meaning which is not expressed in the words or in the context.

LORD BROUGHAM, p. 9:—The construction of the act must be taken from the fair words of the act. We cannot put out what possibly may have been the intention of the Legislature, we cannot aid the Legislature's defective phrasing of the act; we cannot add and mend and by construction make up deficiencies which are left there. If the Legislature did intend that which it has not expressed clearly, much more if the Legislature intended something pretty nearly the opposite of what is said, it is not for judges to invent something which they do not meet with in the word (aiding their construction of the text always of course by the context) it is not for them so to supply a meaning for in reality it would be supplying it: the true way in these cases is to take the words as the Legislature have given them and to take the meaning which the words given naturally supply unless where the construction of those words is either by the preamble or by the context of the words in question controlled or altered; and therefore if any other meaning was intended than that which the words purport plainly to import then let another act supply that meaning and supply the defect in the previous act.

DOOLUBDASS PETTAMBERDASS ET AL. V. RAMLOLL

THACKOORSEYDASS ET AL.²

111. Statutes are, *prima facie*, deemed to be prospective

¹ *Bombay*, 1846 Dec. 15, VI Moore 1.

² *Bombay*, 1850 June 28, VII Moore 240.

CONSTRUCTION OF

only, *nova constitutio futuris formam imponere debet, non præteritis.* (2 Just. 892).

HER HIGHNESS RUCKMABOYE V. LULLOOBHAY MOTTICHUND¹

112. Where words have been long used in a technical sense, and have been judicially construed to have a certain meaning, and have been adopted by the Legislature as having a certain meaning prior to a particular statute, in which they are used, the rules of construction of statutes require, that the words used in such statute should be construed according to the sense in which they have been so previously used, although that sense may vary from the strict literal meaning of the words. So the words: "beyond the seas," employed in an English statute are not to be construed literally, but mean and are synonymous in legal import with the words "out of the realm," or "out of the land," or "out of the territories."

THE QUEEN V. PRICE²

113. The word "forthwith" when used in an Act of Parliament, has been construed to mean "in a reasonable time," as soon as the party who is to perform the act "can reasonably perform it." *Pennant v. Bell*, 9 Q. B. Rep. 684; *Spenceley v. Robinson*, 3 Bar. & Cr. 658; *Hyde v. Watts*, 12 Me. & Wels. 254.

DITCHER V. DENISON³

114. In criminal cases where there is a doubt the benefit must be given in behalf of the person charged with an offence.

LORD JUSTICE KNIGHT BRUCE:—The rule, or maxim, "*Semper dubiis benigniora præferenda*," is, we believe, as true in the law of England as it was in the Roman law, and the statute before us is at once a law of criminal procedure as to the offences to which it relates, and a Statute of Limitations as to penal prosecutions. With reference to that character, the presumption or inclination where presumption or inclination can find place, ought to be, as their Lordships conceive, not against, but in favour of the person charged with an offence, and sued penally under it.

*In re HANIBALL'S PATENT*⁴

115. The Judicial Committee put the following construction on the words "publicly and generally used" employed in the English patent statute.

¹ Bombay, 1852 Nov. 27, VIII Moore 4.

² Ceylon, 1854 Feb. 17, VIII Moore 213.

³ Canterbury, 1857 Dec. 2, XI Moore 343.

⁴ England, 1858 Feb. 2, IX Moore 378.

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THE RIGHT HON. T. PEMBERTON LEIGH, p. 389:— It is not very easy to define what is the exact meaning of the expression "publicly and generally used," contained in the section. No patent is likely to be taken out for a process or machine already in public and general use in the ordinary sense of those words; but certainly we cannot consider the use of the invention on board a single ship, however public or for whatever length of time, as a general user, and, though negative evidence in its nature can hardly be very conclusive, and that produced by the petition applies only to a particular firm, we should be inclined to hold, if it were necessary to decide the point, that we were satisfied that the invention had not been generally, though it has been publicly used, at the date of the original Letters Patent.

GIBAUT V. THE STATES OF JERSEY ¹

116. By the Order in Council of the 28th of March 1771, it was enacted that "the act shall be lodged *au Greffe*, for fourteen days, at least, before it shall be determined...."

The Judicial Committee held, that this Order in Council applies to the preamble as well as to the rest of the Act, and that the non fulfilment of this formality rendered the statute null and void, and they recommended Her Majesty not to confirm this Act.

LORD V. THE COMMISSIONERS FOR THE CITY OF SYDNEY ²

117. In construing grants, the words used must be taken in the sense which the common usage of mankind has applied to them, as well in reference to the context in which they are found, as the circumstances in which they are used.

118. This rule of construction equally applies, whether the subject-matter be a grant from the Crown or a subject.

DILL V. MURPHY ³

119. Construction of the word "define" in an Act of Parliament.

LORD CRAMWORTH, p. 514:— The question solely turns upon the true construction and interpretation of the word "define" used in the 35th section of the Colonial Act. There can be little doubt on this ground. The attempt of the appellant to interpret and give it the meaning of "enumerate" is absurd, and plainly untenable. The word "define" in the opinion of their Lordships is equivalent to the word "declare."

¹ Jersey, 1858 Feb. 1, XI Moore 320.

² N. S. Wales, 1859 Feb. 7, XII Moore 474.

³ Victoria, 1864 Feb. 2, I Moore N. S. 514.

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GRAHAM V. BERRY¹

120. The colonial act gives power to the governor in council to establish new municipalities by proclamation, but before acting, a petition was to be presented to him signed by the householders resident. A petition was accordingly presented by certain householders proposing certain boundaries therein described, but the governor in his proclamation described this new municipality in very different terms from those set out in the petition, including lands, which the petitioners had not asked to be included, and omitting lands which the petitioners had prayed to have included. That irregularity was held fatal to the validity of the proclamation, and consequently the municipality in question was not duly constituted or created in point of law.

THE "LION"²121. Meaning of word "*Passengers*."

LORD ROMILLY, p. 171:—The meaning of particular words in an Act of Parliament, to use the words of *Abbott, C. J.*, in *Rea v. Hall*, 1 B. & C., 136, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used. "It is in this sense that the meaning of the word '*Passengers*' is to be here considered." See MERCHANT SHIPPING ACT.

DYKE V. ELLIOTT. THE "GAUNTLET"³

122. Construction of penal statute.

THE LORD JUSTICE JAMES, p. 438:—It was much pressed in the court below, and again before their Lordships, that the statute being a penal one, it was to be construed strictly. It appears to their Lordships necessary to say a few words as to this topic, which is so often pressed in argument. No doubt all penal statutes are to be construed strictly, that is to say, the court must see that the thing charged as an offense is within the plain meaning of the words used, and must not strain the words on any motion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged although within the words is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed like any other instrument according to the fair common sense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would

¹ N. S. Wales, 1865 March 14, III Moore 205.

² Admiralty, 1869 June 16, XI Moore N. S. 171.

³ Admiralty, 1872 Feb. 9, VIII Moore N. S. 428.

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clearly not be found or made in the same language in any other instrument.

BROWN V. McLACHLAN ¹

123. If a statute professes merely to repeal a former statute of limited operation and to re-enact its provisions in an amended form, an intention to extend the operation of its provisions to classes of persons not previously subject to them is not to be presumed as a necessary inference, unless the intention to the contrary is clearly shown.

REDPATH V. ALLAN. THE "HIBERNIAN" ²

124. The Canadian statute 27th & 28th Vict. ch. 13, sect. 13 declares that no owner or master of ship should be responsible for any loss occasioned by the fault or incapacity of a pilot where the employment of a pilot is compulsory law. Another statute, 27th and 28th Vict. ch. 58, sect. 9 renders employment of a branch pilot obligatory in Canadian waters for each vessel exceeding 125 tons, under a certain penalty which shall go to the Decayed Pilots Fund.

In a cause of collision, held, by the Judicial Committee, that these statutes are to be read and construed together as being in *pari materia*, constituting a compulsory pilotage, and exonerating the owner of a vessel having such pilot on board from liability for damage inflicted on another vessel.

SIR ROBERT PHILLIMORE, p. 349: — When a statute inflicts a penalty for not doing an act, the penalty implies that there is a legal compulsion to do the act in question; and that this principle is not affected by the fact that a penalty has a particular destination.

MALLW0 MARCH & Co. v. THE COURT OF WARDS ³

125. When the law creates a rule of liability and distinction both equally arbitrary, the distinction which protects from liability is entitled to as much weight as the rule which imposes it.

GAUDET V. BROWN. "THE ARGUS" "THE HEWSON" ⁴

126. The only rule for the construction of Acts of parliament is that they should be construed according to the intent of the parliament which passed the act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their

¹ South Australia, 1872 Dec. 11, 1X Moore N. S. 384.

² V. A. Lower Canada, 1872, Dec. 3, 1X Moore N. S. 340.

³ Bengal, 6, 1872 July 6, 1X Moore N. S. 235.

⁴ Admiralty, 1873 May 12, L. R. V. P. C. 153.

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natural and ordinary sense. The words themselves do in such case best declare the intention of the law.

BLACKWOOD V. LONDON CHARTERED BANK OF AUSTRALIA¹

127. When a statute leaves it to a delegated authority to supplement matters substantial as well as formal, these regulations are valid in law and not *ultra vires*, if they fulfil the conditions which are mentioned in the following remarks of their Lordships.

LORD SELBORNE, p. 108:—If these regulations, properly construed, are found to be reasonable and convenient regulations for carrying the act into full effect, though they may govern not only the form but the effect of instruments of transfer of those rights which precede the grant of leases; if they are found to relate to matters arising under the provisions of the act, which they unquestionably do; if they are found to be consistent with the provisions of the act, which they unquestionably are; and if they are not in the act expressly provided for, then their Lordships cannot do otherwise than come to the conclusion that they are valid in law, and that there is no ground for the objection that they are *ultra vires*.

THE MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF MONTREAL V. DRUMMOND²

128 Statutes relating to expropriation, or authorizing a municipal corporation to do certain works, usually give compensation to those injured by the exercise of such rights, but in the absence of such compensation, damages cannot be claimed, according to the doctrine *damnum sine injuria*.

SIR MONTAGUE E. SMITH, p. 410:—Upon the English legislation on these subjects, it is clearly established that a statute, which authorizes works makes their execution lawful, and takes away the rights of action which would have arisen if they had been executed without such authority. Statutes of this kind usually provide compensation and some procedure for assessing it; but it is a well understood rule in England that though the action is taken away, compensation is only recoverable when provided by the statutes and in the manner prescribed by them.

THE QUEEN V. BURAH³

129. A statute conferring upon a governor the right to declare whether the act, or part of it, shall be in force in a certain district, is not a delegation of legislative power, but is conditional legislation.

LORD SELBORNE, p. 906:—Where plenary powers of legislation

¹ N. S. Wales, 1874 Jan. 25, L. R. V P. C. 92.

² Quebec, 1876 May 16, L. R. I Appeal Cases 384.

³ Bengal, 1878 June 5, L. R. III Appeal Cases 889.

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exist as to particular subjects, whether in an imperial or in a provincial Legislature, they may be well exercised, either absolutely or conditionally. Legislation conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient.

ROBERTSON V. DAY ¹

130. This case depends upon the construction of the following *proviso* of the Crown Lands Alienation Act, 1861: "Provided also, that no such application to purchase as aforesaid shall be made for more than one square mile within each block of five miles square out of each lease or a proportionate quantity out of any holding of less area."

It was maintained that the meaning of this *proviso* was that a purchaser might buy a square mile, if it formed part of a block which though not a precise square, contained an area of 25 square miles; and that it was not necessary that it should form part of a block which was a geometrical square containing an area of 25 square miles.

TRIMBLE V. HILL ²

131. Where a colonial legislature has passed an act in the same terms as an imperial statute, and the latter has been authoritatively construed by a court of appeal in England, such construction should be adopted by the courts of the colony.

ORIENTAL BANK CORPORATION V. WRIGHT ³

132. An act was passed by the legislature of the Cape of Good Hope to impose a duty upon bank notes, and a return of notes issued, namely, notes purporting to be issued at the places of business of the banks in the colony to be payable in the colony, was to be made to the government with the object of estimating the duty to be imposed under the act.

This act was held not to apply to notes issued by the bank appellant, in the colony, payable in the colony, but put into circulation in the province of Griqualand West where the bank had a branch. The rule of construction applied by their Lordships being that the intention to impose a charge on the subject of the tax must be shewn by clear and unambiguous language.

¹ N. S. Wales, 1879 Nov. 13, L. R. V Appeal Cases 63.

² N. S. Wales, 1879 Dec. 16, L. R. V Appeal Cases 342.

³ Cape of Good Hope, 1880 July 14, L. R. V Appeal Cases 842.

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CANADA SOUTHERN RAILWAY COMPANY V. INTERNATIONAL
BRIDGE COMPANY ¹

133. "Reasonable charge" must be understood to mean not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who has to pay, whatever may be the benefit of the person imposing the charge.

ATTORNEY GENERAL OF QUEENSLAND V. GIBBON ²

134. The constitution act of Queensland provides that "if any legislative councillor shall for two successive sessions fail to give his attendance, without permission, his seat shall thereby become vacant."

The respondent obtained leave of absence for twelve months from 23rd December 1882 to 23rd December 1883. He was absent, first, during the session, in June and July 1883; secondly, during the session that began in November 1883 and ended in March 1884; thirdly, during the session which began in July and ended in December 1884.

It was held that his seat was vacant, as the respondent who had been absent during three sessions had not obtained permission to be absent for two successive sessions.

135. The word "fail" is not applicable only to cases of wilful or negligent failure, but applies also to the case of failure wholly blameless, and even to illness. It means "absent from."

HARDING V. BOARD OF LAND AND WORKS ³

136. According to the Victorian lands compensation Statute, 1869, No. 344, sect. 35, an owner is entitled to compensation for damage to his lands, by reason of severance from them of the land taken or of the lands being otherwise injuriously affected, and if there is an enhancement in value of his adjoining land arising out of the use or of the construction of the railway, the one should be set off against the other.

BANK OF NEW SOUTH WALES V. CAMPBELL ⁴

137. The act incorporating the appellants contained the provision that it should be lawful for the said bank to purchase, take, hold and enjoy any houses, offices, buildings, lands or other real estate, merchandise, ships, mortgages, etc., for the purpose of reimbursement only and not

¹ Ontario, 1883 July 4, L. R. VIII Appeal Cases 723.

² Queensland, 1886 Feb. 19, L. R. XII Appeal Cases 442.

³ Victoria, 1886 April 3, L. R. XI Appeal Cases 208.

⁴ N. S. Wales, 1886 Feb. 5, L. R. XI Appeal Cases 192.

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for profit." It was held that these last words did not take away from the bank the power of foreclosure against a mortgagor.

SALMON V. DUNCOMBE ¹

138. Where the main object and intention of a statute are clear it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of law, except in the case of necessity or the absolute intractability of the language used.

139. Sect. 1 of the Natal Ordinance 1856 gives to any natural-born subject of Great Britain and Ireland resident in Natal the power of disposing of his property, real and personal, by will according to English law "as if such natural-born subject resided in England."

These words were constructed as being immaterial, and it was held that a will made by a subject born residing in Natal must be interpreted, under the English law, without taking in consideration the question of the residence in England.

COMMISSIONERS FOR RAILWAYS V. HYLAND ²

140. The Judicial Committee held, that the use of the words "colonial mine" in a statute fixing the rates to be paid to carry the produce thereof on railways, meant all the colonial mines from whatever colony, and not only from the colony where the law was made.

MAYOR AND COUNCILLORS OF THE BOROUGH OF PIETERMARITZBURG
V. THE NATAL LAND AND COLONIZATION COMPANY ³

141. In the construction of a statute, the ordinary meaning of the words used must be adhered to unless that meaning is at variance with the intention of the legislature to be collected from the statute itself, or leads to some absurdity or repugnance.

RAILTON V. WOOD ⁴

142. The appellant, a landlord, seized the goods of his tenant for his rent, and having made an inventory of them, had a guardian appointed who took possession of the effects seized. Two days after, the tenant's estate was sequestrated under the Insolvent Act. Afterwards the respondent who long before had bought the tenant's moveables forcibly, took them from the possession of the bailiff.

Under these circumstances, the landlord took an action to recover the goods.

¹ Natal, 1896 June 25, L. R. XI Appeal Cases 627.

² N. S. Wales, 1887 June 17, LVI Law Times N. S. 896.

³ Natal, 1888 March 10, L. R. XIII Appeal Cases 478.

⁴ New South Wales, 1890 June 28, L. R. XV Appeal Cases 363.

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The Judicial Committee deciding the case under the 41st section of the Colonial Insolvent Act, which is in these words: "That no distress for rent shall be made or levied or proceeded in after any order made or sequestration as aforesaid; but the landlord or party to whom the rent shall be due, shall be entitled to receive, out of the assets of the estate so much rent as shall be then due, not exceeding six months' rent in the whole, and shall be allowed to come in as a creditor and share rateably with the other creditors for the overplus."

Held, that according to the true construction of this statute the prohibition only applied to a seizure upon goods which formed part of the insolvent estate to be administered as assets under the Insolvent Act.

LORD FIELD, p. 364:—The rules of construction are now well settled. The authorities are numerous; but their Lordships cannot find a more appropriate enunciation of the rule applicable to the present case than that expressed in the judgment of one of their Lordships (Earl of Selborne) and of the late Earl Cairns in the case of *Hill v. East and West India Dock Company*¹, and, on appeal to the House of Lords². The question which arose in that case was whether the 23rd section of the Imperial Bankruptcy Act of 1869, in the case of a bankrupt who was the assignee of a lease, affected the rights and liability of the lessor and original lessee as between themselves, and this is what Lord Selborne says:—³

"On principle, it is certainly desirable in construing a statute, if it be possible, to avoid extending it to collateral effects and consequences beyond the scope of the general object and policy of the statute itself, and injurious to third parties, with whose interests the statute need not and does not profess to directly deal. In many cases . . . the effect of the statute, if it were construed according to appellant's argument, would be to do a great deal more harm to the parties outside the administration of bankruptcy than it can do good to any body else."

On appeal to the House of Lords, Lord Cairns says, at p. 454:—"It is said that the 23rd section of the Act of 1869 produces this result, and I admit freely that the section seems to me capable of that construction. No doubt, if you read it literally, it does seem to provide that, when any property of the bankrupt acquired by the trustee under this Act, consists of land of any tenure burdened with onerous covenants, the trustee may, by writing under his hand, disclaim such property, and, upon the execution of such disclaimer, the property disclaimed shall, if the same is a lease, be deemed to have been surrendered. . . .

"It is possible that that may mean that, to all intents and purposes, as between all persons, persons actually concerned in the bank-

¹ 22 Ch. D., 14.

² 9 App., cases 453.

³ 22 Ch. D., 23.

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ruptcy and those not so concerned, it shall be a surrendered lease, and shall be altogether out of the case. But, on the other hand, is that the only interpretation? . . . Now, the purpose of this section, and indeed the purpose of the whole statute, is in the first place to declare and discharge the bankrupt in cases where it is proper that he should be discharged from liability; in the next place, to facilitate as early as possible the distribution of the property which is to be divided among the creditors, and the winding up of the bankruptcy; and, in the third place, to protect the trustee from any liability to which he might be subject, and to which he ought not to be subject beyond what is necessary for the purpose of accomplishing the two prior objects. If, therefore, the statute can admit of any construction limited to these particular objects, we must consider whether that is not a construction preferable to the first to which I have referred."

And a little further on, Lord Cairns says: "Where there are two constructions, the one of which will do, as it seems to me, great and unnecessary injustice, and the other of which will avoid that injustice, and will keep exactly within the purpose for which the statute was passed, it is the bounden duty of the Court to adopt the second and not to adopt the first of those constructions." Now, applying these principles to the present case, what do their Lordships find? The language of the statute in describing what it is which it is intended to prohibit, "distress for rent," is so general as to require (as indeed was admitted on both sides at the bar) some limitation in order not to lead to consequences apparently absurd or unjust.

What and whose rent? From and to whom due? What and whose goods? All goods on the premises shall be liable to be distrained by the insolvent's landlord, no matter whose property they are, or only those goods which form part of the estate to be administered.

Both of the latter constructions are within the language of the section, and in order to ascertain which is to be preferred, their Lordships must look at the provisions of the statute and its purview and policy. Now it is a statute, as described in the preamble, for "giving relief to insolvent debtors, and providing for the due collection, administration, and distribution of insolvent estates," and it contains all the usual series of provisions apt to carry those objects into effect, amongst them the 41st section finds in that view its appropriate place, and no section was pointed out to their Lordships dealing with the rights and liabilities of third parties, except when they come into competition with and affect the rights of creditors.

The special policy of the statute is also in harmony with the established policy of legislation in bankruptcy or insolvency, which aims at placing a limitation upon the exceptional remedy of the landlord when it comes into competition with the interests of the general body of creditors, and the special language of the section points to that policy in the present instance. It places a limit upon the undoubted legal right of the appellant to a preferential hold upon specific property which was amply sufficient to meet her claim, and it substitutes for it a payment of the rent in full for six months, leaving her to her right of proof for the rest; but in-

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asmuch as the payment in full is to come out of the assets of the estate, the reasonable inference is that the remedy taken away was one which was in force as against the estate, and not against the goods of a third party, who, if the respondent's contention is correct, would take all the benefits of the limitation of the remedy, and contribute nothing to the substitute.

Again, the respondent's construction would tend to throw upon the insolvent estate a liability to pay six months' rent in full out of assets which would not in any way arise from the abandonment to the estate of any equivalent.

It appears to their Lordships, therefore, that to read the prohibition as affecting a distress of goods the property of a third party would be extending it beyond the scope of the general object and policy of the Act, and injurious to the landlord's rights. For what is the legislature supposed to do in that case?

It is supposed to have interfered with the appellant's legal right of distress, to have rendered useless to her all the expenses incurred before the order for sequestration, and, whilst shewing an intention to give her a substitute, which might not unreasonably be supposed to be adequate having regard to general policy, viz., payment in full of six months, it has limited that right, to payment "out of assets," which in such a case as the present, where a bill of sale holder has swept all tangible property into his security (and they are frequent), would render the substitute absolutely futile.

Of the two possible constructions, their Lordships prefer that which does not extend the operation of the statute to collateral effects and consequences beyond its general objects and policy, and injurious to the landlord, with whose interests in competition with those of a bill of sale holder the statute has not and does not propose directly to deal.

The view which their Lordships thus take is strongly supported by the decision of the court of Queen's Bench in this country in the case of *Brocklehurst v. Lawe*.

It is true, as pointed out by the court below in the present case, that in the statute which was in *Brocklehurst v. Lawe* the subject of construction the distress was expressly stated to be one levied "upon goods or effects of any bankrupt," and that one of the learned judges who decided that case adverted to that circumstance in the course of the argument.

But the expression of these words does not form the ground of the decision, which rested upon the broad principle of construction to which their Lordships have already adverted.¹

The judgment of the court in the present case does not appear to their Lordships to have rested upon any construction put by the court itself upon the statute. Their judgment appears to rest almost entirely upon the authority of a prior case of *Cohen v. Slade*, and decided in the Supreme court, New South Wales, in 1871.

But that case cannot, in their Lordships' view of the true principle of construction to be applied, be regarded as an authority to be fol-

1. 7 E. & B. 176.

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lowed; and their Lordships are also unable to agree in the view taken by the court below that that decision had become so incorporated with the general law and practice of the colony as to lead to the reasonable belief that it had been acted upon so as to render it desirable to uphold it.

See LEGISLATURE : legislative powers, CROWN LANDS : re-sale of land properties.

CONSTRUCTION OF CONSOLIDATED STATUTES

BOSTON V. LELIÈVRE ¹

143. Their Lordships laid down the rule as to the manner in which Consolidated Statutes should be construed in the following remarks.

LORD WESTBURY, p. 434: — The question is governed entirely by the language of the colonial statutes. The court of appeal in Lower Canada is the creation of statute, and the subjects upon which appeal lies to that court are defined with reasonable clearness. The jurisdiction of the court existed before the consolidated statutes, but the consolidated statutes annulled all the antecedent statutes upon the subject. The consolidated statutes may be treated as one great act, and their Lordships think it would not be wrong to take the several chapters as being enactments which are to be construed collectively, and with reference to one another, just as if they had been sections of one statute, instead of being separate acts.

STATUTE OF FRAUDS**CASES NOT WITHIN**

McKAY V. RUTHERFORD ²

144. A contract was made by a contractor with the government to supply stones for the construction of a canal. Held, that an agreement entered into by another contractor to share in the profits of the undertaking, although the contract was not capable of being completed within a year, is not such an agreement, as by the Statute of Frauds, 29th Car. II., ch. 3, s. 4, is required to be in writing, but may be proved by parol evidence according to the law of England by which this cause must be determined.

NOTE OR MEMORANDUM IN WRITING.

WILLIAMS V. BYRNES ³

145. Upon a contract of guarantee for the purchase of a steam-engine, made in the following form: "I will furnish "H. with funds for the purchase of a steam-engine, and

¹ Quebec, 1870 Jan. 25, VI Moore N. S. 427.

² Lower Canada, 1848 Dec. 12, 6 Moore 413.

³ New South Wales, 1863 Feb. 21, I Moore N. S. 154.

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"machinery for a flour mill, on his suiting himself with the same, and notifying the purchase to me."

The Judicial Committee held, that there being no acceptance of the contract in writing, it was not a sufficient note, or memorandum in writing of the bargain, to satisfy the Statute of frauds.

SIR JOHN T. COLERIDGE, p. 195:—Whether this instrument is to be considered as evidence of the contract, or only of a proposal which would become a contract upon the acceptance of it by *Byrnes*, the question is still the same, whether without the insertion of their names in it, or in some other paper connected with it, there is a sufficient note or memorandum in writing of the bargain to satisfy the statute? Apart from authority, and looking only to the words of the enactment, and the mischiefs which it was intended to prevent, their Lordships think the question must be answered in the negative. The words require a written note of a bargain or contract; the statute clearly making no distinction between these two words. This language cannot be satisfied unless the existence of a bargain or contract appear evidenced in writing, and a bargain or contract cannot so appear unless the parties to it are specified, either nominally or by description, or reference. It is true that the statute does not require the whole bargain in all its terms to be stated; it stipulates only for a note or memorandum of it, signed by the party to be charged, but it does in effect require that the essentials, *i. e.* all those things without which it can be no bargain at all, shall be stated. Upon this principle it was that the courts determined, under the 4th section, that the consideration of an agreement must appear on the face of the memorandum of a guarantee, or be matter of necessary implication from its language. It was obviously the intent of the statute to prevent, as far as it could conveniently, the mischief of being obliged to have recourse to oral evidence in regard to the transactions within it. But it would fail to accomplish its object in a most material particular, and in one in which its requirements might always be most easily satisfied, if it did not impose the necessity of stating the name of the seller as well as of the buyer, of the party by whom goods were to be supplied, as well as of him to whom they were to be supplied, under the 17th section, or of the party to be guaranteed as well as of him who is to guarantee, under the 4th section. Unless this be done, oral evidence must be had recourse to, and the risk incurred that a party may be sued by one with whom he had never intended to have any transaction; a matter of the greatest importance under many supposable circumstances.

Much of the difficulty which has been felt in this and similar cases, arises from not carefully bearing in mind the distinction between the necessary elements of a simple contract at common law, especially where it becomes complete, not at once, but by successive steps, and the requisites to make it a ground of action, which the statute imposes.

P. 198:—Their Lordships do not doubt that a promise in writing signed to pay any one unnamed, who shall furnish goods to the

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writer, or to a third person making default, will become a binding contract with any one, whosoever he may be, who shall accept the promise in writing and furnish the goods. But in such case the requisition of the statute will have been complied with.

STREET

See HIGHWAY.

SUBROGATION**CONVENTIONAL**

RENNY ET AL. V. MOAT ¹

146. When the debtor borrows a sum for the purpose of paying his debt, and of subrogating the lender in the rights of the creditor, it is not necessary that the debtor should subrogate the lender simultaneously with the payment.

147. In this case, two sureties paid a privileged debt of the debtor with moneys borrowed from the respondent. Fifteen months after, this latter obtained from the sureties a deed of transfer and subrogation before a notary subrogating him in all their claims against the debtor. The appellants who were the inspectors of the debtor who had become insolvent contested the claim of the respondent. The Judicial Committee admitted the subrogation as legal and the respondent was allocated for the full amount of his claim.

SUBSTITUTED PROPERTY.

LECLÈRE V. BEAUDRY ²

148. If a *grevé de substitution* has in his own title a clause giving him the right to sell the substituted property for an annuity, if it should be judged by experts to be more advantageous to him, and if he takes advantage of this clause and sells his life interest in the usufruct, he has the right to subrogate the buyer into his right to sell the substituted property, which right cannot be deemed extinguished by the sale of the usufruct. *For the remarks of their Lordships, see* SUBSTITUTION: *sale of substituted property, same cause.*

WHAT CONSTITUTES

THE QUEBEC FIRE ASSURANCE COMPANY V. ST. LOUIS ET AL. ³

149. The parish church of Boucherville having been in great part destroyed by a fire, which was occasioned by the negligence of the respondent's servants, and being at the time insured by a policy effected by the *curé* upon the church and sacristy, the *curé* and the *marguillier en charge*, by a notarial instrument, in consideration of the payment

¹ Quebec, 1881 March 22, IV L. N. 195.

² Quebec, 1873 March 1, L. R. V P. C. 363.

³ Lower Canada, 1851 Feb. 6, VII Moore 286.

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by the company of part of the amount of the damage sustained by such fire, did assign, transfer and make over to them all right, title, interest, property, claim and demand whatsoever which the said *fabrique* might have against the respondents for the loss of the said church and other property.

The Judicial Committee held, that this constituted a valid subrogation of the debt due to the insurers in the rights of the *fabrique*, according to the French law. And that on the authority of *Toullier*, tit. 3, arts. 117 and 128, if the transaction be a subrogation, it is immaterial whether the creditor uses the term subrogation or cession in the instrument itself. See INSURANCE: *eodem verbo*.

SUBSTITUTION

CAPACITY OF THE SUBSTITUTE.

KING V. TURNSTALL ¹

150. Wherever there is a limitation by way of substitution, the time when the substitution opens is the time with reference to which the capacity of the substitute to take is to be determined.

THE LORD JUSTICE JAMES, p. 94:—Moreover, it appears to their Lordships, that the difficulty (if any) is entirely removed in this case by the peculiar provision of the old law derived from the Roman law, which has been incorporated into and now forms part of the Canadian code (art. 838), to the effect that wherever there is a limitation by way of substitution, that when the substitution opens is the time with reference to which the capacity of the substitute to take is to be determined.

It is difficult to say to what class of cases that would apply if not to this. It is suggested indeed that this provision was inserted in the Code with regard to the possibility that the intended substitute might not be in existence, or might not have acquired a particular character or qualification at the date of the will or at the death of the testator, and that it applied in such cases only. There is no such limitation expressed in the Code, and it was conceded, and properly conceded, that if the incapacity were clearly a personal incapacity of a general character (as distinguished from an incapacity to take from a particular person), for instance, as that of a felon, a person *civilliter mortuus*, an alien, or a person under any peculiar incapacity of that kind, then in that case, if the incapacity were removed before the substitution opened, the question would have to be determined with reference to the moment when the substitution opened. In the judgment in the original case to which reference has been made a great number of authorities are cited, and there is a passage

¹ Quebec, 1874 July 21, L. R. VI P. C. 85.

² Ricard Pt. 10, No. 814; Furgole. ch. 6, Nos. 14, 42, 44, 45.

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from *Ricard*, in which it is thus stated : etc." *For the full remarks of their Lordships, see LEGACY : capacity of the legatee, same cause.*

CONSTRUCTION OF

LECLÈRE V. BEAUDRY ¹

151. In a gift *inter vivos* (*donation*) by a mother to one of her sons, with the condition that if the donee dies before his brothers and sisters, the property given will return to their lawful issue by roots, the children of a deceased brother before the donation are entitled to a share of the donation as well as those who died after the donation.

SIR MONTAGUE E. SMITH, p. 393 :—A question arose on Beaudry's title, viz., whether the children of Benjamin, one of the brothers of the donee, were, in the events which happened, entitled to a share under the deed of gift. Benjamin was dead at the time of the gift, but four of his brothers and sisters were then living. These all died before the donee, but two of the four left children ; and the question is, whether the children of Benjamin are entitled to one third, as the grand children of the donor, or are excluded by the terms of the donation.

The conclusion to which their Lordships have come on the principal matter in the Appeal makes a decision on this question unnecessary, but since it has been argued, they desire to say they agree with the judgment of the majority of the Court of Queen's Bench in favour of the Respondent on this point.

They think in the events which have happened, viz., the death of F. X. Castonguay without children, having survived all his brothers and sisters, that all the grandchildren of the donor became entitled to share ("par souches"). The literal terms of the ultimate limitation would include the children of Benjamin, although he died before the donor ; and their Lordships do not find in the context such evidence of an intention to exclude them, as would justify a construction different from that which the ordinary and natural meaning of the language imports.

In the result their Lordships will humbly advise Her Majesty that both the judgments of the Courts below ought to be reversed, and that the opposition filed by the Respondent to annul the seizure ought to be dismissed, and that he ought to pay the costs occasioned by such opposition in both the Courts below. *For their Lordships' full remarks, see SUBSTITUTION : sale of substituted property, same cause.*

McGIBBON V. ABBOTT ²

152. An English will by a testator domiciled in Lower Canada must be interpreted with regard to the law of Lower Canada, and not that of England.

Where a testator domiciled in Lower Canada bequeathed a portion of his residuary estate to his executors upon trust

¹ Quebec, 1873 March 1, L. R. V P. C. 362.

² Quebec, 1885 July 18, L. R. X Appeal Cases 653.

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to "pay upon the death of his son, the capital thereof to such son's children in such proportion as my said son shall decide by his last will and testament, but in default of such decision then share and share alike as their absolute property for ever;" the Privy Council held, that the son had not only the right to apportion the capital between all his children, as well those of his then existing marriage as those of any future marriage, but also the right to dispose of the property in favour of one or more of his children to the exclusion of the others.

SIR BARNES PEACOCK, p. 663: — Mr. Justice Ramsay also, in his reasons, states that "Under the Roman law and under the old regime of France there was a great question as to the effect of the substitution of the children or of a class, as for instance the relations, and at last it seems to have been determined that when the children of the *grevé* were called nominatim they held of the original testator, and that the father could not affect the dispositions; but that when the children were called collectively, there was a difference of opinion as to whether the father could select among the children so as to give to some and exclude others." He adds, "although the affirmative of the proposition cannot be supported on a strictly legal argument, it seems to have prevailed." He then cites some authorities in support of his argument.

Their Lordships are not prepared to say that that exposition of the law is not correct. If then, a man to whom an estate is given for life, charged with a substitution in favour of his children after his death, can substitute one or more of his children to the exclusion of others, the addition of the words in the present case, "in such proportion as he shall decide," does not affect the nature or substance of the substitution. It only gives power to the father to do that which he could have done under the general words of the substitution in favour of his children. *For their Lordships full remarks see WILL: exclusion of children, same cause.*

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HERSE V. DUFAUX¹

153. In 1825, a donor by deed of donation *inter vivos* gave to his son the usufruct of certain immoveable property during his life, with substitution in favour of his own children, and in default of such, the deed says: "*la propriété demeurera et appartiendra aux autres héritiers du dit donateur qui en jouiront et disposeront conformément à ce qu'il en aura disposé et ordonné par son testament et ordonnance de dernière volonté.*" By his will, the donor also gave to his son the enjoyment and usufruct during his life of all the property which he should possess at his death, the property to be

¹ Lower Canada, 1872 Nov. 9, IX Moore N. S. 281.

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substituted to his children born in wedlock, and, in default, with power to dispose of such property at his discretion, and without being bound to follow any rule of equality or proportion, among the testator's grandchildren. The son died unmarried, and by his will bequeathed, with other property, some of the land comprised in the deed of donation to two only of the donor's grandchildren.

In a suit by another grandchild claiming a portion of said property, the Judicial Committee held, that the son was *grevé de substitution* in favour of his children, and that the terms "*autres héritiers*" created no substitution in favour of grandchildren, but operated only in the event of the son having no children, as a *retour* to the donor, and made the property capable of passing by his will, as also by the will of the son.

SIR JAMES COLVILLE, p. 307:—It is desirable to determine in the first instance upon the construction of the instrument what intention the donor has expressed in the clause in question, without considering how far such intention was consonant with the law of Lower Canada.

The contention of the appellants is that the terms "*autres héritiers*" import certain *personæ designatæ*, viz., the legal heirs of the donor, other than Joseph Roy and his issue; that the clause operates as a valid and irrevocable substitution in favor of those persons, and that the last sentence of it is satisfied by supposing that the donor reserved to himself the power of qualifying by his last will the enjoyment of the property by his substitutes, to the extent even of making them "*grévés*" with further substitutions. This construction, therefore, admits an intention in the donor to reserve to some extent a testamentary power over the subject of the gift; and *primâ facie* it seems more probable that if he reserved such a power at all he would reserve one which enabled him to select the objects of his bounty, as well as to qualify and control their enjoyment of it. Do, then, the words admit of the latter construction? It may be granted that the terms "*les autres héritiers*", if found in a French instrument, would necessarily import the legal heirs of the donor other than Joseph and his issue to be ascertained at his death, even if they did not import the persons who were such presumptive heirs at the date of the gift. But it is to be observed that, owing probably in a great measure to the fact that the Statute law of Lower Canada has engrafted on the old French law an unlimited power of disposition by will, the word "*héritiers*" has there acquired a signification wider than and differing from that which it would in France. The 597th Article of the Civil Code of Lower Canada, after defining *ab intestate* succession and testamentary succession, says, "The former takes place only in default of the latter;" and again, the person on whom either of these successions devolves is called heir ("*est désigné sous le nom d'héritier*"). It follows from this, 1st, that it was competent to Pierre Roy at any time during his life, after the execution of the act of donation, to deprive his grandchildren of the character of "*héritiers*" in the proper sense of the term; and that, in

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such case, if they took the subject of the donation by a valid substitution they would take it only because they were presumptive heirs, or *heredes viventis* at the date of the act; and, 2ndly, that, when using the term "*autres héritiers*" he may have meant the persons whom by his last will he should constitute his heirs, or, in other words that he may have intended to reserve to himself the power not only of qualifying the enjoyment of the persons who were to take in default of Joseph and his issue, but of declaring who those persons were to be. Their Lordships agree with Chief Justice Meredith in thinking that this latter construction is the true one, and that it is supported by other parts of the act of donation, particularly by that which declares the donor's reason for making it to be his desire to acknowledge and reward the essential services rendered to him by his son; a desire accomplished by an irrevocable gift in favor of Joseph and his issue. They also agree with that learned judge in thinking that some further confirmation of this construction is afforded by the provisions of the then existing will, which it may be presumed the donor had in his mind when he executed the act of donation—a will which he afterwards confirmed by his codicil, and ultimately left as the final expression of his wishes touching the disposal of his estate.

It is, however, contended that the intention thus attributed to the donor is inconsistent with the law of Lower Canada touching donations by acts *inter vivos*; and that the majority of the Court of Queen's Bench was in error in holding that the power, which it supposed the donor had reserved, was one which he could lawfully reserve, and one which, in the event that happened, he had effectually exercised. These propositions are now to be considered.

It has been assumed that the effect of the donation was to create a fiduciary substitution ("*fidei-commissaria substitutio*"), which completely satisfies the definition of such a disposition given by *Thévenot d'Essaule de Savigny* in chapter i, sec. 2, of his treatise; inasmuch as by it Pierre Roy passed the absolute property in the subject of the gift to Joseph, who took some beneficial interest therein, but became "*grevé*" with the obligation to transmit on his death the thing given to third persons, viz., his children. And such a disposition being made by act *inter vivos*, must be taken to be subject to the general rule of irrevocability which is expressed in the old Coutumes by the words "*donner et retenir ne vaut*". Again for the trial of the question now under consideration it must further be assumed that the "*fidei-commissum*" in question is what Thévenot (chapters xvii and xviii) terms "*simple*" and not "*gradual*", i. e., that it extends only to one and not to several classes of substitutes, the disputed clause being only the reservation of a right to the donor, and the question being the lawfulness of such a reservation.

Their Lordships are of opinion that for the law which obtains in Lower Canada they ought to look, in the first instance, to the Civil Code of that Province, which, though enacted after the commencement of this action, is admitted to be, when the contrary is not expressed, declaratory only of the law as it previously existed. And if this be so it follows that the works of learned French authors,

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whether written before or after the promulgation of the Code Napoléon, are useful only so far as they explain what may be ambiguous or doubtful in the Canadian Code. They cannot control its plain letter or express provisions.

The 775th Article of the Code says, "A gift *inter vivos* is an act by which the donor divests himself, by gratuitous title, of the ownership of a thing in favor of the donee, whose acceptance is requisite, and renders the contract perfect. This acceptance makes it irrevocable, saving the cases provided for by law, or a valid resolute condition". Articles 811 to 816 explain what are the cases provided for by law; but none of them are material to the present question, unless it be the final clause of Article 816, which says, "The stipulation of all other resolute conditions, when legally made, has the same effect in gifts as in other contracts." Again, Article 779 says, "A donor may stipulate for the right of taking back (*"le droit de retour"*) the thing given, in the event of the donee alone, or of the donee and his descendants, dying before him. A resolute condition may, in all cases, be stipulated, either in favor of the donor or of third persons." Article 782 says, "It may be stipulated that a gift *inter vivos* shall be suspended, revoked or reduced, under conditions which do not depend solely upon the will of the donee." And Article 783 says, "All gifts *inter vivos* stipulated to be revocable at the mere will of the donor are void." It is obvious that the law thus declared, however closely it may correspond with the ancient law of France, as contained in the Coutume de Paris, differs materially from the law as it exists under the Code Napoléon. The latter prohibits substitutions altogether, and avoids the instrument which attempts to create one, but retains the principle of the irrevocability of a gift by an act *inter vivos*, subject to a "*droit de retour*", which it thus limits and defines: — "*Le donateur pourra stipuler le droit de retour des objets donnés, soit pour le cas du prédécès du donataire seul, soit pour le cas du prédécès du donataire et de ses descendants. Ce droit ne pourra être stipulé qu'au profit du donateur seul.*" (See Code Civil, Articles 894, 896, 951.) Nothing is said in these Articles of any resolute condition other than this limited "*droit de retour*."

A resolute condition (a term which comprehends the "*droit de retour*," however limited) is thus defined by Dalloz (*Répertoire de Jurisprudence*, Article 1740): "*Il y a condition résolutoire, en matière de donation, lorsque la donation se réalise immédiatement, avec tous les effets qu'elle doit produire, au profit du donataire, mais sous la clause que, si tel événement incertain arrive, la donation prendra fin, et que les choses seront remises au même état que s'il n'y avait pas eu donation. Le donateur, qui était maître de ne point donner du tout, peut évidemment ne donner que sous cette modalité. Mais quel sera l'effet de l'accomplissement de la condition résolutoire? On vient de dire qu'elle ne suspend point la réalisation de la donation: ainsi le donataire acquiert, dès à présent, la propriété même des biens. Mais lors de l'accomplissement de la condition, la donation sera résolue, c'est à dire que le donataire cessera d'être propriétaire des biens qui lui ont été donnés et livrés.*"

It is obvious from this passage that when a resolute condition

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takes effect it operates as a revocation of the gift, and divests the donee of the property in the subject of the gift which the act of donation had conferred upon him. If, then, it was competent to Pierre Roy by the law of Canada to stipulate by way of resolute condition that, in the event of his dying without lawful issue, the property should pass as he might direct by will, there can be no difficulty as to the *modus operandi* of the condition when it took effect. The proprietary right in this land thereupon ceased to be in Joseph Roy or his heirs; it fell again within the dominion of Pierre, and became capable of passing with the rest of his estate under his will.

Let us now try the legality of the supposed condition by the Articles of the Canadian Code. It does sin against the principle of irrevocability, because its accomplishment does not depend solely on the donor, but on the happening of an event under which he had no control, viz., the death of Joseph without issue.

If it be objected that it is not strictly a "droit de retour" within the meaning of the first clause of Article 779, because the event on which it depends is not that of the donee and his descendants dying before the donor; the answer is that it may nevertheless be "a valid resolute condition," within the meaning of the latter clause of that section, which says that a resolute condition may be stipulated either in favor of the donor alone, or of third persons. On the letter of the Code the supposed condition seems to be a valid one. It has, however, been strenuously argued on behalf of the appellants that the illegality of such a condition is established by the authority of writers like Demolombe and Troplong who, though they are professedly only commenting on the Code Napoléon, incidentally state what was the ancient law of France on this subject. Their Lordships desire to say nothing that may seem to derogate from the authority of these eminent jurists. It is, however, obvious that the works cited do not profess to be a complete or authoritative exposition of the old law; and that if they were, it would not follow that the law of Lower Canada, during the long period that has elapsed since the separation of this province from France, has not more or less departed from the stricter rules which, even before the Code Napoléon, may have obtained in France. However, their Lordships are not satisfied that these writers are so adverse to the contention of the respondents as they have been represented to be. Both sides have appealed to M. Troplong's commentary on the 951st Article of the Civil Code, vol. ii, paragraph 1261 to 1269. The Article is that which restricts the "droit de retour" within the limits above-mentioned. And the general object of the learned commentator is to show that particular provisions may fairly be construed to be reservations of a "droit de retour" rather than substitutions; the consequence being that in the former case the reservation, if within the limits prescribed by the Code, will be operative; and, if beyond those limits, will be simply inoperative: whereas such provisions, if construed as substitutions, would vitiate the whole disposition. He applies this reasoning to a stipulation for a "droit de retour" to the donor or his heirs, arguing that it was not because the latter was really a substitution, but because its consequences were similar to

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those of a substitution, that the Code Napoléon limited the benefit of a "droit de retour" to the person of the donor, excluding his heirs. And he fully admits that by the ancient law such a reservation would have been valid, and that, if the donor happened to die before it took effect, his heirs might have claimed the benefit of it. He says: "There will always be this essential difference between the "droit de retour" and a substitution, that in the former case the heir comes forward as the representative of the donor and as exercising a right which would have come to him by reversion if an exceptional law had not deprived him of it; whereas the substitute is only a third person who is so far from exercising any rights of the donor that the latter in making an institution and substitution, has shown that he does not wish to retain any of his rights, but that he abandons them all." He adds, "En un mot, dans le droit de retour, stipulé même au profit des héritiers, la chose donnée remonte vers sa source; dans la substitution, elle s'en éloigne; dans l'un elle est censée rentrer dans la succession du donateur défunt, comme si elle n'en eût jamais sortie; dans l'autre, elle passe dans un patrimoine étranger." Troplong, therefore, must be admitted as an authority in favor of the proposition that a stipulation for a "droit de retour" to the donor or his heirs was permitted by the ancient French law. He no doubt afterwards comes to the conclusion that where the stipulation is for a "droit de retour" for the benefit of a third person, whether heir or not, and without mention of the donor, the stipulation is either altogether invalid, or can take effect only as a substitution; "le donateur n'étant pas du tout dans la stipulation de retour." But on this it is to be observed that if the stipulation really imports the reservation of a power to the donor on the happening of a certain contingency to dispose of the property by his will, it is in substance a "droit de retour" to him and his testamentary heirs, although he is not expressly named in the condition; its effect being to bring back the property into his succession as if it had never gone out of it. And the objection founded on the mere letter of the stipulation, viz., that it does not in terms mention the donor, can hardly prevail against the words of the 779th Article of the Canadian Code which says, "A resolutive condition may in all cases be stipulated either in favor of the donor alone or of a third person".

Their Lordships having to deal with an instrument, as to the construction and effect of which there has been so much difference of opinion amongst those conversant with such dispositions, and with the law to be applied to them, have naturally felt considerable doubt in this case. But the conclusion to which they have come is that the construction put upon the disputed clause by the majority of the Court of Queen's Bench is correct; and that there is nothing in the law of Lower Canada which is repugnant to that construction, or to the effect given to it.

They may further observe that even if the appellants had succeeded in showing that the reservation implied in the construction put upon the clause by the judgment of the Court of Queen's Bench was unlawful, they would not thereby have established their right to recover in this case. To establish their title they must show that

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the clause constituted a valid and irrevocable substitution in their favor. That consequence does not necessarily follow because the clause was not a valid resolutive condition at all. The argument for the appellants assumed that the words might import the reservation of a power to the donor to "grever" the substitutes with further substitutions. Hence, if he did not intend to create, and did not create an irrevocable substitution in favor of the other heirs, the clause may well be taken to reserve a power, which has not been duly exercised, to "grever" the institute Joseph Roy with further substitutions. But what would be the effect of holding either that the condition was altogether void, or that it reserved a power to create new substitutions in succession to the first, which had not been exercised. The effect would obviously be that there was not valid substitution after that in favor of Joseph's children; and that, on the failure of that, the property became absolutely his, and capable of passing under his will. On this view of the case it would be only necessary to qualify the grounds of the judgment, which would have to remain a judgment for the dismissal of the appellants' suit. Their Lordships, however, have already intimated their opinion that the judgment, as it now stands, ought to be affirmed.

This being so, it is unnecessary for them to decide the question of ratification, and they abstain the more willingly from the consideration of that question, because they have not the benefit of the judgment of the Court of Queen's Bench upon it. They may, however, observe that whatever might have been their opinion as to the effect of the Act of the 10th of October 1848, they would have felt considerable difficulty in holding that there had not been "acceptation tacite" by reason of the receipt of the rents of the property bequeathed by Joseph Roy to Madame Grothé, and in distinguishing this case from that of *Roy v. Gagnon* (3 Lower Canada Reports). Nor, as at present advised, are they satisfied that Mr. Justice Smith was warranted in treating the amendment in the pleadings which had been made under a judge's order, pronounced after hearing both parties, as "utterly irregular and insufficient to put the plaintiffs to answer."

Their Lordships will humbly advise Her Majesty to affirm the Decree under appeal, and to dismiss this appeal with costs.

RIGHT OF THE SUBSTITUTE.

DE MONTFORT V. BROERS.¹

154. The testator by his will instituted trustees whom he charged with the management of his estate and to continue his affairs as in his life-time, the revenues of his estate to be divided two-fifths to the trustees and three-fifths to his daughter, to be paid to her when she has attained twenty-five years of age until her death; and at her death the residue of the estate, interest and capital to be divided amongst her children.

¹ Cape of Good Hope, 1887 Dec. 22, L. R. XIII Appeal Cases 149.

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At the age of twenty-five years, the daughter and the trustees made a deed of compromise in settlement of all the revenues of the estate up to that time. This compromise was contested by her children who were the substitutes, but it was held, that they were bound by the deed of compromise effected by their mother.

SALE OF SUBSTITUTED PROPERTY.LECLÈRE V. BEAUDRY ¹

155. Where the donor who has given a property and charged it with a substitution in favor of the donee's children, gives at the same time to the *grevé de substitution* the power to sell the land for a rent charge, if it should be thought by experts to be more advantageous to him, it is not necessary for the donee to have experts appointed by the court to value the property or to have the sanction of any judicial authority to sell the property.

156. And if such authorization were obtained, and if the judge should impose any condition not required by the donor, that part of the decree should be considered as directory only, and not as imposing a condition which rendered the sale void if it were not complied with.

157. The power given to the donee to sell the property may be by him assigned and made over to another person.

SIR MONTAGUE E. SMITH, p. 388.—The principal objections urged at their Lordships' Bar on this part of the case were based on the deed of subrogation, by which Leclère was subrogated in all the rights of the donee. It was contended that the power of sale was a trust for the benefit of the substitutes, which could not be delegated, but their Lordships think this is not its true nature. The settlor gave this power to her son the donee, who was the principal object of her bounty, for his own benefit, as well as that of his successors. She guarded the substitution by two conditions, viz., by requiring the sale to be for a rent charge, and a previous report of experts. In so far as the power of sale affected the usufruct, Leclère had, after the transfer to him, a beneficial interest in the exercise of it, and to that extent the subrogation was protective of his own rights. The execution of the power, no doubt, remained with F. X. Castonguay, and he, in fact, did exercise it by authorizing and joining in the sale, and executing the deeds of conveyance.

No authority in Canadian law was cited to show that the alienation of the usufruct by Castonguay, and the subrogation of his rights in Leclère, rendered the execution of the power by the former invalid. Upon principle, there is no reason it should be so. It might be very much to the prejudice of the substitution to hold that powers of this kind were extinguished upon a sale of the usufruct, which the

¹ Quebec, 1873 March 1, L. R. V P. C. 362.

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grevé is competent to make, or that its subsequent execution should be considered necessarily to indicate fraud. In an analogous case arising in England it was held that the power was not extinguished, and that its subsequent exercise was not evidence of *mala fides*. (See *Alexander v. Mille, L. R., 5 Ch. App. 124*).

No doubt Leclère took the most active part in the management of the sale, but F. X. Castonguay concurred in all that was done, and had separate legal advisers to whom the conditions of sale were submitted. Nothing unusual or objectionable has been pointed out in these conditions, and it appears the usual and full publicity was given to the sale.

Evidence was given of negotiations between Leclère and Mr. Simpson, with a view to establish that Simpson was prevented from bidding by a promise from Leclère to sell to him after the auction, but the proof on this point is quite inconclusive; and, on the other hand, there is much evidence to show that Leclère exerted himself to obtain a good sale, and to counteract the efforts of Beaudry himself to prejudice it. There is satisfactory evidence that the sale was well attended, and that the biddings were fairly conducted.

Although some of the circumstances in the case are undoubtedly such as to rouse suspicion, and the attention of their Lordships has been properly called to them, they do not think it necessary to comment further upon the facts, particularly after the finding of Mr. Justice Monk already referred to, from which the majority of the Judges in the High Court expressed no dissent, and in which Mr. Justice Badgley strongly concurred. The latter learned judge says:—"The general charges of fraud and connivance alleged against Leclère are entirely without foundation."

Their Lordships therefore consider that the sale cannot be annulled on the ground that it was a dishonest one.

Its validity was next impeached on the ground that the formalities required by law had not been observed.

The objections on this head are, that the second report of the experts was not homologated, and that the subsequent proceedings in the conduct of the sale were taken without the further sanction of the court.

Their Lordships consider that these objections cannot prevail, unless it can be shown that it was necessary for the due execution of the power that the sale should take place under the authority of the court. But the counsel for the respondent failed to establish to the satisfaction of their Lordships that, by the law of Canada, the exercise of powers of this kind require judicial sanction, and all the judges below were of the contrary opinion. Notwithstanding, however, this opinion, it was held by the judge of first instance (Mr. Justice Monk) and by the majority of the judges in the court of Queen's Bench, contrary to the opinion of Mr. Justice Badgley, and that of the Chief Justice Duval (who concurred with him) that the *grevé* having once applied to the court was bound to act to the end under its directions. It will be seen that the judges declare even this opinion with great doubt and hesitation.

Mr. Justice Monk says: "As to the question of the homologation

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of the second report, the court finds difficulty in holding it to be necessary—"à peine de nullité." It is not easy to see why an action was necessary at all by François Xavier Castonguay. The donation gave a right to sell "*à constitution de rente*," after the report of experts was made, and why should he bring a suit? Nevertheless, he did sue, and the court ordered the sale after certain formalities; it homologated the first report, and if the donee took legal proceedings he was bound to carry them out; and have the second report homologated also, and the new terms and conditions of sale sanctioned by the court. This is the opinion I have arrived at."

The opinion of Mr. Justice Caron, in which Mr. Justice Drummond and Mr. Justice Loranger concurred, is to the same effect. The learned judge says in substance, that being of opinion the donee could sell the property without having recourse to judicial authority, he at first thought the erroneous proceedings which had taken place could not injure the sale, since they ought to be regarded only "*comme un simple surplusage*"; but that on reflection he thought that, the donee having sought and obtained a judgment, the conditions which it imposed ought to have been followed.

Mr. Justice Badgley speaks without doubt. He says, "It is conceded on all hands that François Xavier Castonguay had full and sufficient authority by the deed to make a valid sale without recourse to proceedings at law, but desirous *ex cautela* to give the assurance of law to his power by a declaratory judgment in favour of his right, he was advised to institute a suit at law for this purpose, which required a representation of the substitution to be defendant in the suit, against whom the judgment might be rendered "*contradictoirement*."

It appears from the statement of the proceedings already given that the suit arose in this way: F. X. Castonguay, desiring a tutor to the substitution to be appointed for the purpose of naming an expert on their part to make the declaration required by the deed of gift, applied to the court. This was apparently done to obtain the nomination of an expert which should be beyond question. But the tutor having, when appointed, refused to name an expert, and disputed the right to sell, Castonguay took further proceedings to procure a judicial declaration of his right to sell. The court made this declaration of his right by their decree of the 13th of October, 1857, but annexed a condition, not required by the donor, that a valuation should be made by experts. It is not necessary to consider whether this condition was rightly imposed, because it was complied with, and the report of the experts homologated. Besides this condition the "consideration" of the judgment contains the words "*en observant les formalités requises*," and it was argued that this clause made it necessary to observe all the forms required on judicial sales. Their Lordships consider this is not so. They think it very doubtful whether it was competent for the court to impose new conditions upon the sale not required by the donor, and none, in fact, are specifically imposed by the decree, except that requiring a valuation. They think that the "consideration" can at most be regarded as directory only, and not as imposing conditions which rendered the

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sale void, if not complied with. It may be granted that the formalities referred to not having been observed, the sale cannot have the quality of a judicial act; but if, as their Lordships think, the sale did not require judicial sanction, it cannot be annulled for the absence of it.

It is unnecessary to say whether, even in the case of a sale requiring judicial authority, the non-observance of the usual formalities, would, before the introduction of the code, have been of itself a sufficient ground for annulling it; for their Lordships agree with the first impression of the judges below, that in this case, the authority of the court was not required.

A further objection was, that the tutor to the substitution ought to have been consulted in the management of the sale, and particularly as to the condition of sale.

It was not in their Lordships' view established by the argument at the Bar that the appointment of a tutor was essential to the valid exercise of the power of sale; and it appears to them that, at the most, the tutor was only necessary for the purpose of having the experts duly appointed.

Article 951 of the Code of Lower Canada, which was assumed to be declaratory of the former law, was relied on; but that article does not relate to sales made in virtue of a power contained in the settlement. Such cases appear to fall within article 952, which is in these terms:—

"The grantor may indefinitely allow the alienation of the property of the substitution, which takes place in such case, only when the alienation is not made."

The French law applicable to the province does not appear to require the appointment of a tutor where the alienation is allowed by the grantor.

M. Thévenot D'Essaule in "*Traité des Substitutions*" (1266) speaks of the tutor to the substitution as a novel introduction. After referring (1272) to two cases which do not comprehend the present, he says (1273):—

"Hors ces deux cas fixés par l'ordonnance, nos tuteurs à la substitution ne sont guère nommés que pour mettre le grevé en état de faire juger ses prétentions contre les substitués dont le droit n'est pas ouvert. C'est un personnage qui a été imaginé pour donner au grevé un adversaire," &c.

It is evident that the appointment here spoken of being for the purpose of providing an adversary, where a judicial decision on some claim of the *grevé* in opposition to the substitutes is sought to be obtained, the rule is not applicable to the case of a sale in exercise of a power, where, as already shown, no action and no judicial sanction were required.

It has already been pointed out that the appointment of the tutor was originally applied for in this case to name an expert on the part of the substitutes. It, no doubt, appears that when the tutor declined to nominate one, he was treated as an adversary against whom, as representing the succession, the suit was continued to obtain a declaration of the right of the *grevé* to sell. But if neither

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a suit nor judicial authority for the sale were necessary, their Lordship think the fact of the tutor being made an adversary in a needless suit cannot render his participation in this actual sale essential to its validity.

Their Lordships have therefore come to the conclusion that none of the objections made to the sale can be maintained. In doing so, they are glad to be spared the necessity of setting aside a sale which the family itself has not objected to, at the instance of a stranger who purchased an interest at a low price, on the speculation that he might succeed in annulling it.

SUCCESSION**ACCEPTANCE OF**LEFEUVRE v. LEFEUVRE¹

158. Where a person to whom a succession has devolved has renounced it, and has assisted to the inventory and to the report of the sheriff recorded in court, without any proceeding on his part, it is too late a month after, to demand, by remonstrance to the court, to accept and share in the succession.

HEIRS OF NATURAL CHILDREN.HER MAJESTY'S PROCUREUR-GENERAL v. BRUNEAU²

159. According to the law of France, the heirs of a natural child are his father and mother who recognized him, and in their default, his natural brothers and sisters or his "*descendants*" except with regard the property the deceased has received from the father or mother, which goes to his legitimate brothers and sisters according to article 766 of *Code Civil*.

160. In that article the word "*descendants*" is not limited to legitimate descendants, so as to preclude the natural children of a natural brother succeeding to their natural uncle's property. There is no restriction with respect to the word "*descendants*" in art. 766; natural children are "*descendants*" within the meaning of arts. 765 and 766, which constitute a special law for determining the succession of natural children dying without posterity; and "*postérité*" and "*descendants*" in those articles are convertible terms.

161. Held also, that, in England, an illegitimate child is "*nullius filius*."

THE LORD JUSTICE TURNER, p. 311: — Before entering upon the consideration of the particular articles of the Code on which this question must ultimately depend, it is, as it has seemed to us, im-

¹ Jersey, 1837 Nov. 29, II Moore 70.

² Mauritius, 1866 Feb. 17, IV Moore N. S. 1.

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portant to consider the general principles by which the courts are to be governed in the construction of the Code. These principles, as laid down by the Court of *Cassation*, and the leading text writers of France, are conveniently collected in the 3rd section of Sirey's note upon article 1 of the Code, (Nos. 111, 112, 112 *bis*, 113, 114, 119).

It results, we think from these principles, that in determining this question we are to be guided by the plain sense of the law which applies to the question; that we are to make no distinction, which can alter that sense; that, assuming the sense of the law to be positive, we are not to modify or restrict the law; that we are not to weigh the reasons of the law against the words of it; and (which, perhaps, is more pertinent in its bearing upon the present case), that if the law applicable to the case be special, we are to understand it according to its particular scheme ("propre système"), without adding to it the rules of what is called the common law.

ESCALIER V. ESCALIER ¹

162. In Trinidad, under the Spanish law and before the Ordinance of 1845, children born before marriage have the status of legitimate children for every purpose, except that of succeeding as heirs to real estate in England. This last Ordinance assimilated the law of this Island to the law of England.

PURCHASE OF FUTURE See PRESCRIPTION: *iusdem verbis*,
SALE: *iusdem verbis*.

WENTWORTH V. HUMPHREY ²

163. The Real Estates of Intestates Distribution Act, 1862, of New South Wales, enacting that in case of intestacy, the real estate should be administered and should devolve precisely as chattels before the said act, introduced a new rule of succession to real estate, and applies to all cases whether the intestate left an heir or not.

SURETYSHIP

BY PUBLIC OFFICERS.

WILDES V. ATTORNEY GENERAL OF TRINIDAD ³

164. The Treasurer of the island of Trinidad gave a recognizance to secure the due payment of those moneys only for which the governor had to give his warrant, that is, the public moneys of the colony for public purposes.

The Privy Council held, that the crown had a privilege over the estate of the Treasurer for those moneys alone, and not for deposits made into the latter's hand by suitors under an order of the court of justice of the island.

See LEGACY.

¹ Trinidad, 1885 March 25, L. R. X Appeal Cases 312.

² New South Wales, 1886 July 24, L. R. XI appeal cases 619.

³ Trinidad, 1840 July 2, 11f Moore 200.

BY MARRIED WOMEN.MACKELLAR V. BOND ¹

165. By the law which prevails in Natal, a wife cannot be effectually bound as a surety, even when she executes the deed by her own hand, unless she specially renounces the benefits of the *Senatus Consultum Velleianum*, and also the benefits of *De authentica*.

166. A husband cannot make this renunciation and bind his wife as a surety under a general power of attorney; it would require a special power of attorney with express words to that effect.

COMPENSATION.ALLEN V. KEMBLE ²

167. A drawer and an endorser of a bill of exchange are deemed sureties for the acceptor, and therefore entitled to oppose in compensation against their endorsation a liquid debt of the same amount due from the creditor to his principal.

CONSTRUCTION OFTHE BANK OF BRITISH NORTH AMERICA V. CUVILLIER ³

168. A recital in a deed of warranty indicating the motive which prompted the execution of the deed, does not control the engagement, when such engagement is general and more extensive than the limited object for which it is supposed to be given.

LORD CRANWORTH, p. 200 :—In this cause the Judges of the court in Canada appear to have given very great attention to the subject, and had it not been that we have had an opportunity of considering the matter in course of the evening, and also had the great advantage of having before us in print a full report of all the reasons of the Judges, we might have thought it due to them and to ourselves to have taken a little time to consider what the course was that we should pursue, but having had all these advantages and having come to a clear opinion upon the subject, we have thought it right not to delay the parties in the announcing of our Judgment. The first thing which I notice is this; I believe we have come clearly to the conclusion that the whole question turns upon the construction of this instrument, and if it turns upon that, the facts in truth, can hardly be said to be in any respect, in dispute. The question is, what is the meaning of this deed of Guarantee? In the last judgment the Chief Justice La Fontaine, (giving his reasons in French,) says, "La question de l'effet du cautionnement est une question qui doit être décidée par le droit Français exclusivement." We, early

¹ Natal, 1884 June 25, L. R. IX Appeal cases 715.

² British Guinea, 1848 April 13, 6 Moore 314.

³ Lower Canada, 1861 Feb. 6, XIV Moore 187.

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in the argument, asked whether it was contended that there was any difference between the French law on this subject and the English law, but it was answered that there was not, and indeed it was pretty certain that there could not be; therefore the question, what was the meaning of this deed, would be the same whether it was to be decided by French law, or by English law.

Now the majority of the Judges have considered that the effect of this guarantee, though general in its terms, is to be limited by the recital, which controls in their opinion, that generality; and the first and main question is whether that is the right view of the case or not, and with all due deference to the learned Judges, and having given the fullest attention to their reasons, which are very ably and briefly put forth, we have come to the conclusion that that is an erroneous view of this deed. We think that whatever limited motive there might be, the way that limited motive was to be accomplished was by a general engagement, and if so it often happens that the engagement which is given is more extensive than is absolutely necessary for the limited object for which it was supposed to be given, but it does not follow therefrom that the general engagement is necessarily to be cut down.

In this case we think, attending to all the language of the deed, and that what is stated in the recital is merely stated as the motive, not as anything which is to control what is afterwards done, but merely as the motive for what is done, it is impossible to cut down the effect of the guarantee itself.

I must confess that going much beyond that, supposing it had been said in the deed to have been a guarantee for the objects "hereinbefore recited", I should have felt very reluctant to say that the motive was not equally a motive which included the object for which this money was advanced. It was advanced to enable Maurice Cuvillier to carry on trade and commerce at Montreal and elsewhere if he should think fit.

Well now, for what purpose was it advanced? It was advanced for the purpose of enabling him to continue the trade, which, as I collect from the evidence, he was then carrying on in partnership with his firm. I suppose he did not quite understand what his relations exactly were; the father had died, and the brother was absent, with whom alone until his death, or soon afterwards he carried on business, but he afterwards took in other partners. Then what was there in the deed which was to confine that trading to the object of carrying on trade as a joint trader; nothing in the world that I can discover. The cases in which there is a guarantee with a firm and that guarantee has been affected or annihilated by afterwards the firm becoming a different firm, really have no bearing upon this case. The question here is not whether he carried on trade alone, or with others, but whether he carried on any trade and commerce, and if he did carry on trade and commerce, the advance for that purpose, even if that were necessary or material to the action sufficiently answer the object of the guarantee, whether he carried on trade alone or not.

On this short ground—that the whole question turns on the

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construction of the instrument, and that in truth there is nothing in the recital which controls the effect of the engagement, we think the judgment ought to have been for the Appellants, the Plaintiffs below, and consequently that the Judgment of the court in Canada must be reversed.

LINDSAY V. ORIENTAL BANK ¹

169. Where a bond and mortgage are contained in one instrument, the power to create the one security cannot have any influence in determining the validity or invalidity of the proceedings under the other, as although comprised in the same instrument, they are different securities, leading to different results, and capable of being enforced by different modes of proceeding.

DISCHARGE OF THE SURETY.**BELLINGHAM V. FREER ²**

170. According to the old law of France, when the dealing between the creditor and his debtor, amounts to actual, though but *pro tempore* payment, as when the creditor draws bills of exchange on the principal debtor which are accepted or receives promissory notes, the surety being deprived of the right of suing the principal debtor, is discharged, but if such dealing operates simply as a prolongation of time for the payment of the debt, as the surety is not precluded by such dealing, from suing the principal for his indemnity, he is not discharged.

HON. THOMAS ERSKINE, p. 344:—The remaining and most material question, is whether *Bellingham Wallis*, by taking the acceptances, discharged *Noah Freer*, the surety, from his liability to pay the balance?

This question must be decided by the principles of the French law, which differs, in some respects, from the law of England.

There is one rule, however, which is equally recognized by both, namely, that the surety ought not to suffer by the arrangement which has taken place between the creditor and the principal debtor: *Nemo ex alterius facto prægravari debet*.

But the condition of the surety may be differently affected by the same circumstances under the one law and under the other. *Pothier, Obligations, part. 2, chap. 6, sec. 7, art. 2, No. 442*.

In these cases, a surety under the English law, would have no such power to protect himself. It has, therefore, been very fairly argued, that a surety, under the French law, is not entitled to the same indulgent consideration as a surety under the English law. He cannot, indeed, in all cases, proceed against the principal debtor for his own indemnity, before he has paid the debt; but he may do so if

¹ Ceylon, 1860 June 23, III Law Times N. S. 98.

² Lower Canada, 1837 May 16, I Moore 333.

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he perceives that the debtor is falling into embarrassment, though he has not paid, or been called upon to pay.

MACDONALD V. BELL ¹

171. By the Civil Law sureties are not discharged from their liability to satisfy the creditor, although the benefit of a hypothec given by the debtor is lost by the negligence of the creditor to enforce his demands. No authorities in the Roman, Dutch or Civil Law were found by their Lordships to satisfy them that the sureties were exonerated. This case was decided on the authority of *Pothier*, lib. 46, tit. 1, s. 5, article 2, s. 47, and same author, Obligations, p. 3, c. 1, art. 6, s. 2.

THE BANK OF BENGAL V. RADAKISSEN MITTER ²

172. A firm having dealing with the bank of Bengal, gave it as collateral security, for the discounting of different bills of exchange amongst them, five bills drawn by respondent, on accommodation paper for the firm, various quantities of copper with the condition that in default of payment within the time specified, the bank might dispose of the copper by sale to reimburse themselves the principal and interest due thereon. The firm having become insolvent, the bills were dishonoured, but before the disposing of the securities by the bank, the assignee of the firm redeemed the copper by paying the bank in full, except, however, the five bills drawn by the respondent. In an action by the bank against the respondent, it was held, that the redemption of the securities was a sale within the meaning of the above condition, and that this sale did not operate as a release to respondent, as surety for the five bills, the copper having been given to apply to all debts for the reimbursement of the bank generally.

BLACK V. THE OTTOMAN BANK ³

173. A surety sued upon a bond given to a bank as guarantee, for the due discharge of certain specified services by their manager and cashier, cannot set forth as a plea the negligence and want of due care on the part of the bank, in not properly checking and examining the accounts; this duty on the part of the bank not being expressed as obligatory on the principals in the bond, and not being implied in law.

THE RIGHT HON. LORD KINGSDOWN, p. 483 :—The principles

¹ Cape of Good Hope, 1840 Dec. 15, III Moore 315.

² Calcutta, 1842 June 28, IV Moore 140.

³ C. C. Constantinople, 1862 July 3, XV Moore 472.

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applicable to the case seem to be quite established by the authorities referred to in the argument : *The Trent Navigation Company v. Harley* (10 East, 34) ; *Mactaggart v. Watson* (3 Cl. & Fin. 525) ; *Dawson v. Lawes* (1 Kay, 280) ; to which may be added the authority of Lord Eldon in the cases of *Samuel v. Howarth* (3 Mer. 278), and *Eyre v. Everett* (2 Russ. 381) ; and of Lord Cottenham in *Creighton v. Rankin* (7 Cl. & Fin. 346).

From these cases it is clear that, upon the point now in dispute, the rule at law and in equity is the same, that the mere passive inactivity of the person to whom the guarantee is given, his neglect to call the principal debtor to account in reasonable time, and to enforce payment against him, does not discharge the surety ; that there must be some positive act done by him to the prejudice of the surety, or such degree of negligence as, in the language of Vice-Chancellor Wood in *Dawson v. Lawes*, "to imply connivance and amount to fraud."

The surety guarantees the honesty of the person employed, and is not entitled to be relieved from his obligation because the employer fails to use all the means in his power to guard against the consequences of dishonesty.

The cases referred to upon bills of exchange turn upon a different principle, viz., that, by mercantile usage, a contract is implied by the holder to give notice of dishonor, within a certain time, to the drawer or indorser who stands in the situation of surety for the acceptor.

DEBRETTE v. GOODMAN¹

174. At a judicial sale of real estate in St. Lucia, a man acting as attorney for another man and for his wife, both absent from the island, purchased an estate on their behalf. The sale was made by three trustees, two of them being resident in England, the third, at St. Lucia, acting under a power of attorney, and the respondent became party to this sale as surety for the buyers. By the deed of arrangement for the purchase and by the notarial deed, it was stipulated that the sale should be confirmed and ratified by the two trustees resident in England within six months, which was duly done. Default, having been made in the payment of one of the instalments, the trustees brought an action against the appellant as surety for the amount of this instalment. But it appeared in the evidence that the power of attorney, to the purchaser was not from the man and his wife, but from the man alone, and contained no authority from his wife.

The Judicial Committee held, that the surety was not liable, as the sale professed to be to a man and his wife by the three trustees, while in fact the sale was to the husband

¹ Saint Lucia, 1855 June 19, IX Moore 466.

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only, and as such was an ineffectual and void sale and the surety was discharged.

WARD V. NATIONAL BANK OF NEW ZEALAND ¹

175. A surety is discharged by the creditor dealing with the principal or with a co-surety in a manner at variance with the contract, the performance of which the surety had guaranteed. For instance, a surety is discharged by the creditor giving time to the principal, even though the surety may not be injured, and may even be benefited thereby *Samuel v. Howarth* 3 Mer. 272; *Holme v. Brunskill* 3 Q. B. D. 494; *Polatz v. Everett*, 1 Q. B. D. 669.

176. On the same principle, when the creditor releases one of two or more sureties who have contracted jointly and severally, the others are discharged, the joint suretyship of the others being part of the consideration of the contract of each. *Boxer v. Cox*, 4 Beav. 379.

177. But where it is no part of the contract of the surety, that other persons shall join in it, in other words, where he contracts only severally, the creditor does not break that contract by releasing another several surety, and the surety cannot therefore claim to be released on the ground of breach of contract, although he is entitled to contribution against other several sureties. *Dering v. Lord Winchelsea*, 1 Cox, 318; *Craythorne v. Swinburne*, 14 Ves. 169; *Stirling v. Forrester*, 3 Bli. 590; *Pearl v. Deacon*, 24 Bea. 186; 1 de G. & J. 461.

TAYLOR ET AL. V. BANK OF NEW SOUTH WALES ²

178. The appellants were sureties jointly and severally to the respondents to the amount of £3500, for money advanced to the principal debtor, who as a collateral security mortgaged in favour of respondents a stock of about 6500 sheep. The bank having sold 2500 sheep, without the knowledge of the appellants, and the purchaser not having paid the price of the sale, the appellants claimed to be discharged from all their liabilities or at least to the extent of £810 the price of the sale of the 2500 sheep, as they had been illegally deprived of the benefit of the collateral security given by the principal debtor upon which they were entitled to rely for their protection.

The Judicial Committee held, that the sale of these sheep from time to time must have been contemplated by the

¹ New Zealand, 1883 July 11, L. R. VIII Appeal cases 755.

² New South Wales, 1886 June 25, L. R., XI Appeal Cases 396.

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deed of mortgage and that the sureties were not discharged by the sale.

IMPUTATION. *See* IMPUTATION : *isidem verbis*.

IMPLIED.

CHERRY ET AL. V. THE COLONIAL BANK OF AUSTRALASIA ¹

179. Where two directors of a joint stock company, without any authority from the rest of the directors or the majority of them, write a letter to the company's bankers certifying that their manager had the authority to draw cheques for the company, and upon the faith of this letter, the bank honoured the manager's cheques, although the account of the company was overdrawn, the two directors were held personally liable, this letter being an implied warranty on their part.

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¹ Victoria, 1869 July 7, VI Moore N. S. 235.

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TESTAMENTARY EXECUTOR

ADVANCES MADE TO

GAVIN V. HADDEN¹

1. Moneys *bona fide* advanced to an executor as administrator for the purposes of the estate, may be recovered by a suit against him in his representative character, and the judgment obtained may be executed against the testator's estate.

2. If a creditor of a person who happens to be executor, by colluding with such executor, dishonestly obtains judgment and execution against the assets, when his claim was only against the executor personally, such a transaction can be set aside.

3. In Ceylon, the rights of an executor are the same as in England, except that they are extended to immoveable as well as moveable property.

COMPROMISE BY

DE CORDOVA V. DE CORDOVA²

4. Where a co-executor owed the estate large sums of money and was, at the same time, a legatee for a less amount, and an agreement was entered into between all the executors that the amount of the legacy with a certain sum paid in cash should be set off against a like amount of his debt, a subsequent compromise with all his creditors, including the co-executors, by which a composition was effected at five shillings in the pound, reviving the full amount of the debt and of the legacy, was held to be null and void; the first agreement was held to be binding and the composition, a breach of the trust on the part of the co-executors.

¹ Ceylon, 1871 July 10, VIII Moore N. S. 90.

² Jamaica, 1879 July 26, L. R. IV Appeal Cases 692.

COMPROMISE BY

5. An executor cannot compromise a debt due from himself to the estate. *Cooke v. Collingridge*, 1 Jac. 607; *ex parte Lacey* 6, Ves. 625.

LORD EDON, p. 703:—One of the most firmly established rules is, that persons dealing as trustees and executors must put their own interests entirely out of the question, and this is so difficult in a transaction in which they are dealing with themselves, that the Court will not inquire whether it has been done or not; but at once say that such a transaction cannot stand."

DEBTOR ASTURNER V. COX ¹

6. In equity, the appointment, by a testator, of one of his debtors as his testamentary executor does not destroy the debt, and the priority, if it was a preferential debt, exists as if a stranger had been the one named.

7. In the West Indies, it is not competent to a testator to change by his will the legal distribution of his assets, by directing a distribution equally among his creditors; and the statute Geo. II, ch. II made immoveables legal assets, in such a way as to give or secure the same priority to specialty creditors against real estate that they always have had against personal estate.

LIABILITY OFFREYHAUS V. CRAMER ET AL ²

8. An executor who takes no interest under the will, is not liable to pay the debts of the testator, if he enters into possession of the estate, and takes on himself the administration of the property belonging to it.

9. Acts of administration, such as paying for the schooling and maintenance of the testator's children, making advances to their mother, selling moveables, are not in any case, sufficient dealings to render him responsible to the creditors of the estate.

LORD WYNFORD, p. 112:—Vanderlinden, book 1st, c. 6, sec. 10, in his Institutes of the Laws of Holland, treating of executors, says nothing of their being liable *de bonis propriis*, if they once take on themselves the administration of the effects of the testator; but when he comes to speak of the heir, he says: "The heir, by accepting the inheritance, cannot afterwards repudiate; and he becomes tacitly bound in law by thought for the payment of all debts and charges on the estate, tho' at they may exceed the value." I think we may collect from this writer, saying nothing as to the executors rendering themselves liable, and from his telling us, the

¹ Barbadoes, 1853 April 14, VIII Moore 288.

² Demerara, 1829 June 30, 1 Knapp 107.

LIABILITY OF

moment that he speaks of the heir, that the heir having accepted the inheritance is liable to all the debts and the charges, that an executor in trust would not, by acting as such, incur this responsibility. An heir, under the laws of Justinian, might protect himself from incurring the liability of paying *bonis propriis* by claiming the benefit of the inventory; Voet, *lib. 28, tit. 8, s. 13*.—"This seems to extend the law which governs the cases of heirs to executors, but it must be understood that Voet is speaking of executors, who take a beneficial interest and not of such as are only trustees for others. Such as take possession of an estate for profit may, without injustice, be made to incur the risk of loss, according to the maxim: *Qui sequuntur commoda, iidem et incommoda sequuntur*." But there is no pretence for saying that an executor, who from his regard for the testator, and for the compensation for his trouble, which the laws of many of the colonies have allowed him, takes upon himself the administration of the affairs of a deceased person shall be obliged to pay the claims on an insolvent estate.

The European nations who have adopted into their codes the principles of the civil law, made a great difference between an heir and an executor. In Scotland, the executor is only liable *secundum vires inventarii*, (that is, to the amount of the inventory or estimate made of the property of the deceased,) but the heirs are liable in *solidum* (Lord Stair's Institutes, book 3, tit. 4, cap. 32,) and the benefit of the inventory was first given to him by an Act of the Scotch Parliament of 1695, cap. 26. In France¹ also the executors are only liable to the extent of the property of the testator that they possess themselves of (Pothier, *Traité des donations testamentaires*, cap. 5, art. 2d). There he shows that the Civil Law with regard to heirs has no reference to executors in France. As there is no direct authority proving that the laws relative to heirs apply to executors in trust, we can have no difficulty in saying that we will not extend a law which is somewhat severe, even in cases of persons who take the benefit of the inheritance, to those who expect to derive no advantage from it; but we do not think that the delay, which took place before curators were appointed, or the acts done by the respondents, would be sufficient to subject them to pay the debts *de bonis propriis*, if the law relative to heirs applied to them. Voet, *Com. in Pan., lib. 6, lib. 28, tit. 8, sec. 1*; Codex, *lib. 9, tit. 30, "De jure deliberandi"*; Voet, *lib. 29, tit. 2, No. 5*; Heinneccius, *Elem. Ju. Civ., lib. 2, tit. 19, sec. 592*.

According to these writers, nothing is sufficient to constitute a person an acting heir, but that which amounts to an express or implied contract on his part to take on himself this character; in the present case, only three acts were done, one of these was for the preservation of the property, the two others from compassion to the children of the deceased and their mother.

These acts may make the respondents liable to answer to the curator for the property thus disposed of, but it cannot (particularly as they had on behalf of the heir asked for the *jus deliberandi*)

¹ For the Law of France respecting executors, see also the *Code Civil*, *liv 3, sec. 7*, and the *Code de procédure civile*, *livre 2*.

LIABILITY OF

amount to proof of an intention take on themselves the administration of the affairs of the deceased, and to subject themselves to the liability of all the consequences that might arise from it.

The court, which has appointed the curator, has also ordered an account to be taken of the estate.

If the respondents have wasted or misapplied any part of the property, or if the estate has been injured, by their not having sooner administered it, those who take that account will take care that the respondents make good the loss. That is all that justice requires from them. There is no colour for saying that they ought to be obliged to pay all the debts, whatever may be their amount, and however unequal the estate of the deceased may be to the discharge of them.

By the Scotch law, if a man acts as a vicious intromitter, that is, if without any pretence for acting as executor, he takes upon himself the general disposition of the deceased property, he must pay all his debts. Lord Stair, in his Institutes, says: "This is peculiar to this, and no other nation." I believe that learned writer is correct without assertion. We know it is not the law of England, for an executor *de son tort* (although he without any pretence of authority interferes with the assets of the deceased person), is called upon, and is only answerable to creditors to the extent of property that has come to his hands. But the respondents were not vicious intromitters; they were authorized to act by the will of Valz, and in such a case, even in Scotland, where the law is more severe against such person than in any other country, they would only have been liable to the amount of deceased's property.

LABOUCHERE V. TUPPER¹

10. An executor of a trader carrying on the trade after the latter's death, is personally liable for all the debts contracted in the trade after the testator's death.

11. The executor of a deceased shareholder in a joint stock-company, was held not liable to make good out of his testator's assets, debts contracted by the company subsequently to the testator's death, though the shares were registered in the executor's name, and he received the dividends in his character of executor, the debts due at his death having been subsequently discharged by the company.

POWERS OF**STUART V. NORTON**²

12. According to Roman-Dutch law, testamentary executors may name substitutes to represent them.

13. So where an executor resident in England, appointed with other executors and devisees in trust resident in Bri-

¹ *Iles of Man*, 1857 June 17, XI Moore 198.

² *British Guinea*, 1860 Nov. 29, XIV Moore 17.

POWERS OF

tish Guiana, to administer property situate in the colony, which appointment was made with the following clause in the will "without the powers of assumption, substitution and surrogation," may, notwithstanding, appoint an attorney to act in the colony on his behalf in matters of discretion, as well as others matters connected with trusts.

THE LORD JUSTICE KNIGHT BRUCE, p. 33 :—It is said that according to the English law, a trustee cannot delegate discretion, cannot act by another in a matter of discretion ; but even in the English law that general rule may be open to exception, and their Lordships are not at the present moment prepared to say, that a trustee in England under an English will, may not effectually appoint an attorney to act in matters of discretion connected with the trust in a Colony or any Foreign country.

DANIEL V. TROTMAN ¹

14. A testator named an executor with the power to manage the property and to apply the profits in payment of the expenses of executing the trusts ; the executors were given the right to raise in aid of the personal estate, not specifically bequeathed, so much money as should be required to satisfy funeral expenses and debts, and the liens and charges on the real estate. A merchant, under a verbal agreement made advances to the executor to clear the estate from the charges and to satisfy legacies and annuities given by the will. The executor having misappropriated a portion of the advances made to him, a suit was instituted for the administration of the estate, and the court disallowed all advances which the creditor could not prove to have been applied for the benefit of the Testator's estate.

The Judicial Committee reviewing this judgment held, that the executor having the power under the will to bind the future profits of the estate, for advances made for the management of the estate, and having sufficiently exercised that power, the creditor consignee was not bound to see to the application of the advances made by him.

THE LORD JUSTICE TURNER, p. 151 :—Their Lordships collect from the order under appeal, that in the opinion of the Court in Barbadoes, the appellant was bound to see to the application of the moneys advanced by him under the agreement ; but, however this may have been in the view which the Court in Barbadoes took of the case, their Lordships are of opinion, that as the case really stands no such obligation rested on the appellant. The moneys advanced were not meant nor intended to be applied to any defined or special purpose. They were of necessity to be applied at the discretion of the Trustee to whom they were advanced. To hold that the appel-

¹ Barbadoes, 1863 Feb. 17, 1 Moore N. S. 123.

POWERS OF

lant's firm were bound to see to the application of these advances would in effect render it impossible that any advances could be made. The principle which governs the cases as to the obligation of seeing to the application of money applicable to the payment of debts seems to their Lordships to settle this question.

UNDERWOOD V. PENNINGTON ¹

15. An Act of Parliament was passed giving to certain trustees under a will the power to sell the immoveables of the estate, and enacting that "the legal estate in the lands and "hereditaments devised by the will of the said James "Underwood shall for the purposes of this Act vest in "certain persons appointed trustees by the will. Another statute was passed permitting the appointment of two other trustees and giving them the same right.

Held, that the trustees had the right, under these statutes, not only to sell the lands, but to maintain an action in ejectment.

HARDING V. HOWELL ²

16. Under the Act of 1872, in Victoria, a husband becoming the administrator of his wife's estate takes the real estate of his wife intestate, from the day of her death, in the fullest manner with statutable powers and duties for its realization and distribution. He must realize the real and personal property, and after the payment of debts and other liabilities, distribute the surplus to the next of kin.

**FARNUM AND WILLEMS V. ADMINISTRATOR GENERAL OF
BRITISH GUIANA** ³

17. A testator providing for the administration of his estate named two executors, jointly and severally, and in case of refusal or inability of one of them, he appointed another, and, if the two first, and this last one did not or could not accept, he nominated two others, with the power of "assumption, surrogation, and substitution to any of "them, to the last surviving of them, and to any by them "assumed, surrogated, and substituted for the purposes "aforesaid."

The Judicial Committee held, that the two last survivors of the executors only could name a substitute, and that the nomination made of the respondent by one of the first two named in the will, the other being living in England, to

¹ New South Wales, 1877 July 27, XXXVII Law Times N. S. 321.

² Victoria, 1889 March 9, L. R. XIV Appeal Cases 307.

Guiana, 1889 July 25, L. R. XIV Appeal Cases 651.

POWERS OF

administer the whole estate, was null and void. *Travis v. Illingworth*, 2 Dr. and S. M. 344.

REMOVAL OF

LETTERSTEDT V. BROERS ¹

18. The court of Equity of the Cape of Good Hope has jurisdiction for the removal of trustees for misconduct.

19. In exercising such a delicate jurisdiction, no general rule can be made beyond the very broad principle that the best guide must be the welfare of the beneficiaries.

REMUNERATION OF

GRANT V. CAMPBELL ²

20. In Jamaica, under 24 Geo. 2, ch. 19, the testamentary executor is paid by a commission for the management and disposal of the estate. It was held, by the Privy Council, that although one of the trustees did not take part in the administration and did not act in his quality, he was however entitled to the commission, as he had never refused to act and was willing to do so if called upon.

HENCKELL V. DALY ³

21. The commission referred to in the above case of *Grant v. Campbell* is paid only out of the proceeds of the sale of an estate, that is only on receipts and payments of the money; and it must be a sale made in the island of Jamaica.

SALE OF IMMOVEABLE ON

BULLEN V. BECKETT ⁴

22. The immoveables of a deceased man do not pass to his executor and are not in his hands legal assets, so that they may be seized upon him and sold for a debt of the testator, according to the law in force in Victoria, although in this colony real estate is liable for simple contract debt, as lands are liable in England for bond and especially debts

SALE BY See SALE: *iisdem verbis*.

SUBSTITUTION OF See TESTAMENTARY EXECUTOR: *powers of*

TOWAGE**PERFORMANCE OF CONTRACT.**

WARD V. MACCORKILL ⁵

23. A steamboat engaged to tow a vessel for a fixed sum, does not warrant the vessel against all risks, but, in law, she

¹ Cape of Good Hope, 1884 March 22, L. R. IX Appeal Cases 371.

² Jamaica, 1815 Sept. 23, 1 Moore 43.

³ Jamaica, 1828 May 17, 1 Moore 51.

⁴ Victoria, 1863 June 29, 1 Moore N. S. 223.

⁵ Admiralty, 1861 August 1, IV Law Times N. S. 810.

PERFORMANCE OF CONTRACT.

is only obliged to use her best endeavours, competent skill, and a reasonably sufficient crew, tackle, and equipments to fulfill her engagement. If unforeseen difficulties occur, such as the breaking of the ship's hawser, she is not relieved from doing her best.

24. If a sudden violence of wind or waves puts the ship in tow in danger, and the tug incurs risks and performs duties not within the scope of the original engagement, then the tug is entitled to additional remuneration for additional services, if the vessel be saved, and may claim as a salvor instead of being restricted to the sum stipulated for towage. The towage contract is then superseded by the right to salvage, except when the danger is attributable to the fault of the tug. *See SALVAGE.*

WHEN DUE.

THE GENERAL STEAM NAVIGATION COMPANY V. JERSEY.
THE "EDWARD HAWKINS" ¹

25. Where a steamer made an agreement for a fixed sum, to tow a disabled steam vessel to her destination, and she accordingly towed the vessel for some hours, but in consequence of a gale causing the breaking of the hawser, left the vessel in a position of considerable danger. It was held, that as the steam vessel was only saved by her own exertions, the steamer was not entitled to recover against the steam vessel under the unperformed contract.

TRADE MARK**INFRINGEMENT OF**

SOMERVILLE V. SCHEMBRI ²

26. Even where there is no legislation on trade marks, if a person choose one and employ it in the market to indicate goods manufactured by himself, he becomes proprietor of it and has an exclusive right to use it alone, and no one else can make use of the same mark for the same class of goods.

LORD WATSON, p. 454 : — In Malta there is no law or statute, establishing the registration of trade marks, and no authority exists from whom an exclusive right to a particular trade mark can be obtained. The rights of the parties to this cause are therefore dependent upon the general principles of the commercial law, some of which are referred to in the judgment of the Court of Commerce. These principles have been very fully illustrated and explained by the House of Lords in the following cases: *Leather Cloth Company Limited v. American Leather Cloth Company Limited*, 12 L. T. Rep.

¹ Admiralty, 1862 July 10. XV Moore 486.

² Malta, 1877 March 5, LVI Law Times N. S. 454.

INFRINGEMENT OF

N. S. 742; 11 *H. L. Car.* 538; *Wotherspoon v. Currie* 27 *L. T. Rep. N. S.* 398; *L. R. 5 H. of L.* 508; *Johnston & Co. v. Orr-Ewing & Co.*, 46 *L. T. Rep. N. S.* 216; 7 *Appeal Cases* 219, all of which were cases which arose before the passing of the first British Trade Mark Registration Act in the year 1875. In the first of these cases, the interest which a merchant or manufacturer has in the trade mark which he uses was thus defined by *Lord Cranworth*, 11 *H. L. Cas.* pp. 533-34. "The right, which a manufacturer has in his trade mark is the exclusive right to use it for the purpose of indicating where, or by whom, or at what manufactory, the article to which it is affixed was manufactured." As soon, therefore, as a trade mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the exclusive property of the firm; and no one else has a right to copy it, or even to appropriate any part of it, if by such appropriation unwary purchasers may be induced to believe that they are getting goods which were made by the firm to whom the trade mark belongs. Had it not been for the views expressed by the Court of Appeal in giving judgment it would hardly have been necessary for their Lordships to observe that the acquisition of an exclusive right to a mark or name in connection with a particular article of commerce cannot entitle the owner of that right to prohibit the use by others of such mark or name in connection with goods of a totally different character; and that such use by others can as little interfere with his acquisition of the right. In the present case it is beyond dispute that the cigarettes made by the appellant's firm were favourably known in the markets where they were sold, under the appellation of "Kaisar-I-Hind." The use of the term by others as a name for ships, or as a trade mark for hats soap, or pickles, could not impede their acquisition of an exclusive right to use it as trade mark for their cigarettes. The evidence given by Kinaldo Perini, regarding the use of the term as a trade mark for cigarettes, does not appear to their Lordships to be sufficient to cut down the appellant's right; it is vague and indefinite both as to time, place, and persons; and it is hardly creditable that during the whole period of his residence in London the name "Kaisar-I-Hind," which had its origin in the Proclamation of 1877, following upon the Act 39 Vict. c. 10, should have been in use. Besides, his evidence is at variance with the testimony of Nicholas Cooper Morris, who dealt in cigarettes in London, and must presumably have known what was sold in the London market. The real question, therefore, comes to be whether the respondents have infringed the appellant's exclusive right; and that question, as Lord Kingsdown said in the *Leather Cloth Company's* case 11 *H. L. Cas.* 539, depends upon "how far the defendant's trade mark bears such a resemblance to that of the plaintiffs as to be calculated to deceive incautious purchasers. Upon this part of the case their Lordships entertain no doubt. Schembri and Navarro put up their cigarettes for sale in boxes of the same size and shape with those used in their trade, by the appellant's firm, and the device on the lid of each box is an exact copy of that firm's label, with one or two colourable

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INFRINGEMENT OF

variations. Whilst retaining all the essential features of the label the respondents have introduced certain *differentiae* which may very fairly be described in the language used by Lord Blackburn in *Johnston & Company v. Orr-Ewing & Company*: "These are differences which might prevent purchasers being deceived. I do not think they are such as to prevent its being likely that they would be deceived. In that state of the facts, it is not necessary to the appellant's success that the respondent should have intended to mislead; but their Lordships agree with the judge of the Court of Commerce in thinking that it is impossible to acquit them of that intention. It appears to their Lordships that the decree of the Court of Commerce is couched in terms somewhat too wide, and that it ought to have been confined to an injunction such as the English courts were in use to grant in similar cases. Their Lordships will accordingly advise Her Majesty to reverse the judgment of the Court of Appeal, and also to reverse the judgment of the Court of Commerce, except in so far as it reserves the decision of the appellant's second claim; and to restrain the respondents or either of them from using the label or device upon the lid of *Schembri* and *Navarro's* boxes produced in process, and referred to in the judgment of the Court of Commerce, or any similar label or device; and also from using the name or trade mark "Kaisar-I-Hind" in connection with any cigarettes other than those manufactured by the appellant's firm, so as to represent or induce the belief that any such cigarettes were manufactured by the said firm. Their Lordships will also advise Her Majesty that the respondent *Paolo Schembri*, who, as representing his firm to *Schembri* and *Navarro*, appears to have taken the leading part in this litigation, ought to pay the costs of the appellant in both courts below.

TRANSACTION**EXECUTION OF**KING V. PINSONEAULT¹

27. When a transaction has been agreed upon between two parties to a suit, one of them may sue in execution of the transaction before he has discontinued the first action; it is sufficient for him to offer to discontinue it as soon as the other will have executed the transaction.

SIR ROBERT P. COLLIER, p. 258:—The actions were not for the same cause. The first action was brought against Pinsonneault and Hamilton, for the purpose of setting aside a deed of 1839, and obtaining an account of the full amount of the sum received by Pinsonneault with payment thereof; or, in default of such account and payment for damages. The second action was brought against Pinsonneault alone to enforce an agreement of 1870, and not only to obtain payment of a sum of money, but to enforce the settlement of another sum upon trusts wholly outside of and collateral to the first

¹ Quebec, 1875 March 2, L. R. VI P. C. 245.

EXECUTION OF

action. Nor was the discontinuance of the first action a condition precedent under the agreement to enforcing that agreement by action. The performance by the parties of their parts of the agreement respectively, were, in their Lordship's opinion, concurrent conditions, and this being so, it was sufficient for the plaintiff to aver in his declaration that he had been and was ready and willing and that he offered to perform his part, viz., discontinuance of the first action on the defendant performing his part of the agreement. Their Lordships are further of opinion that he has not made a step inconsistent with this averment, and they find that it is proved in fact.

Although the form of procedure differs in England and Canada, some observations of the vice-chancellor Turner in *Askey v. Wellington* (9 Hare, 65) are applicable in principle and in reason to the present suit. The vice-chancellor observed that some cases which he referred to "appear to establish that, at least in cases where the compromise goes beyond the ordinary range of the court in the existing suit, and the right to enforce the agreement in that suit is disputed, the proper course of proceeding for enforcing it is by bill for specific performance, and not by motion or petition in the original suit to stay the proceedings, and I think that *à fortiori*, this must be the case where the agreement itself is disputed." It may be collected that the putting an end to the original suit in that case was not deemed a condition precedent to instituting the second.

It becomes, therefore, unnecessary to decide whether or not the plaintiff could have enforced the "transaction" in the first action, or whether, if he could, he has taken the proper steps for doing so.

For these reasons their Lordships are of opinion that the court of Queen's Bench were wrong in declining to give judgment on the validity of the "transaction"; it becomes, therefore, their Lordships' duty to determine this question, and to give the judgment which ought to have been given by the court of Queen's Bench.

The objection that the "transaction" was not intended to be final, but was subject to some act of confirmation by the court, is not noticed by Mr. Justice Beaudry, who seems to have thought his ruling on the want of authority sufficient to establish the third plea and to dispose of the suit. Their Lordships have no doubt that it was intended to be final. *See the remarks of their Lordships on the validity of the transaction: ATTORNEYS: powers of attorneys ad litem.*

GROUNDS FOR ANNULING

TRIGGE V. LAVALLÉE¹

28. The term "transaction" of the old French law, which is equivalent to a compromise in English law, is an agreement to put an end to disputes, and to terminate and avoid litigation; and, in such cases, the consideration which each party receives is the settlement of the disputes, the real consideration being, not the sacrifice of the right, but the abandonment of the claim; and it is no objection to the

¹ Lower Canada, 1862 Dec. 5, XV Moore 270.

GROUNDS FOR ANNULING

solidity of such a contract, that the right was really in one of the parties only.

29. Such contract, like any other, may be set aside for *dol*, fraud and error according to the principles of the civil law.

30. On this subject, the French law, the English law and the Scotch law are similar and based on the civil law.

31. A deed of transaction was passed between the appellant and the respondent, for the purpose of compromising certain disputes which had arisen between them relative to a certain mill-dam erected by the respondent in and across a branch of the river Nicolet. The appellant took proceeding to enforce this agreement, but Lavallée resisted and disputed the validity of the deed on the grounds that he was induced to enter into this transaction by fraud on the part of appellant, and in ignorance of material facts of his rights, and without any consideration for it.

The Judicial Committee held, that a transaction cannot be vitiated for error of law, but it may be set aside for error of fact, if the error is of such a character that it must be considered as the determining motive of the parties in entering into the agreement. The transaction in this case was maintained.

LORD KINGSDOWN, p. 292: — But this is not the nature of the agreement; it is quite of a different character. It falls under the head of what in French law is termed a "transaction," and in English a compromise. It is an agreement to put an end to disputes, and to terminate and avoid litigation, and in such cases the consideration which each party receives is the settlement of the dispute; the real consideration is not the sacrifice of a right, but the abandonment of a claim. The French law, to which we must look for the decision of this case adopts the definition of the civil law and it is expressed by Domat, "*Des Transactions*," vol. 1, p. 341, in these words:—"La transaction est une convention entre deux ou plusieurs personnes, qui, pour prévenir ou terminer un procès, règlent leur différence de gré à gré de la manière dont ils conviennent, et que chacun d'eux préfère à l'espérance de gagner jointe au péril de perdre." It is no objection to the validity of such a compromise that the right was really in one of the parties only.

If two persons claim adversely to each other the inheritance of a deceased person, and in order to avoid litigation agree to divide the inheritance between them, it is no ground for setting aside the agreement that one only was the heir, and that the other, therefore, gave up no right, which he really possessed. The consideration which Lavallée agreed to take for this grant was the abandonment by Chandler of all attempts to disturb him in the enjoyment of his mill and dam, and the agreement not to erect within certain limits new mills; and this consideration he actually received. There is, therefore, clearly no reason for annulling this agreement on the ground

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that Lavallée received no consideration for it. But it is said that an agreement of compromise, like any other agreement, may be set aside for what the French law terms "*dol*," or want of good faith in either of the contracting parties; and it is alleged that Chandler, by his agent, was guilty of "*dol*," by misrepresentation of his title, and by using intimidation towards Lavallée. The misrepresentation imputed to him is that he claimed by his protest rights as seignior of Nicolet which did not belong to him, and treated as within his seignior a part of the river which was actually within the boundaries of La Baie; and it is contended, that as he had been for many years the owner of some portions of the seignior of Nicolet, including La Fourche, and had resided within it, he could not have been ignorant either of the boundaries of his seignior or of the rights which belonged to it; and that, therefore, if his claim were unfounded, he must have known them to be so at the time when he made them.

But the proceedings under the act for abolishing feudal tenures in Canada show that upon both these points he might be honestly mistaken. With respect to the boundaries of seigniories, it appears that when this part of Canada was settled by the French government about the year 1680, the country was waste and uncultivated, and for the most part covered with woods, and that any very precise description of boundaries was scarcely possible; that the plan of settlement adopted was to grant a large plot of land to some person as seignior, in order that he might grant it out to tenants or "*censitaires*" for the purpose of cultivation. The grant of the seignior of La Baie describes the boundary on one side as two leagues in a forest, to be measured from the Lake St. Pierre, with the isles, islets and meadows, which might be met with in that space, and it is by means of this measurement that it is made out that this seignior at the place in question includes the whole channel of the river, though the shore bounding it on the side of Nicolet is within that lordship. It might well, therefore, when the notice was given, be a matter of doubt whether the whole or part of the stream was not also within that lordship, though at the trial of the cause the fact had been ascertained, and was admitted to be otherwise. The fact itself was not, perhaps, of any great importance, for the diversion of a stream running through several seigniories, could not be justified simply by the circumstance that the particular place at which the diversion was made belonged to only one seignior. On referring to the maps of Canada, it appears that the Nicolet is a very large river divided by the Isle La Fourche into two branches, of which the south-west branch must run through many seigniories besides that of La Baie, and certainly runs along, and probably in part of its course entirely within the seignior of Nicolet. But the fact (whether material or not) was made out by the title deeds of the respondent; he had, therefore, at least equal means of knowing it with Chandler, and there is no more reason for imputing actual knowledge to Chandler than to him. As to the general feudal rights of the seigniors; when they were abolished by an act of the legislature in 1854, a commission, consisting of all the judges,

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was appointed for the purpose of determining questions which might arise with respect to them. A very large proportion of those questions appears by the proceedings to have related to the rights of the seigniors in non-navigable streams and waters within their seigniories. They insisted that, notwithstanding the grant of the lands by them to their tenants or "*censitaires*," they still retained the property in all these waters, and a right to the exclusive use of them for the purposes of mills and manufactories. This claim was not allowed by the commissioners, though it seems to have been in some instances recognized by judicial decision. With respect to mills, it appears that each seignior was bound by law to build a grist mill within his seignior for the use of his tenants; that the tenants were bound to resort to such mill; and that no person, except the lord, was at liberty to build a mill of the same description within the seignior. These mills were called "*moulins banaux*"; and if a mill of the same kind were erected within his seignior by any other person, the lord had the right to demand its demolition. He also claimed the right of taking back from any "*censitaire*" a portion of the land included in his grant for the purpose of erecting such mill, making a reasonable compensation. Whether this last claim was well founded or not does not appear to have been decided by the judges under the commission; but it is submitted as a proposition of law by the attorney general. Now, Chandler's protest is quite in conformity with these claims. He insists that, in his character of seignior of Nicolet, and La Fourche, he is entitled to all non-navigable streams within the seignior, and to the exclusive right of buildings mills and manufactories of all kinds within the same; and he alleges that the proceedings of Lavallée in erecting the dam and quay within his seignior were an infringement of his rights. It may admit of doubt whether Chandler's claim to interfere with the works of Lavallée's mill within his (Chandler's) seignior was without foundation.

If the lord had a right to prevent the erection of any grist mill within the lordship, on the ground that it might interfere with the custom due to his own mill, there seems room for argument that he might prevent the erection within his seignior of a mill of that description, which might be equally injurious to him, though the main building was situate within the limits of an adjoining seignior. The question, however, is not whether Chandler could have sustained his claim, but whether it was so unreasonable that it could not have been advanced *bonâ fide*; and we certainly cannot come to that conclusion. It is mentioned in his protest that he had served a notice of claims to the same effect in the year 1825, on the Despins, the then owners of the mill. We feel bound to say that we can discover nothing in this case to support the charge of wilful misrepresentation by Chandler, nor can we find any sufficient evidence of surprise or intimidation of the respondent. Many months intervened between the service of the protest and the agreement, and there is nothing to show that the respondent was in any manner under the control or influence of Chandler, or in such circumstances or condition of life as to be subject to intimidation by him.

GROUNDS FOR ANNULING

The retrocession obtained from Richard, and the threat by Chandler to build a mill in the seignior of Nicolet, are in a great measure explained by the state of the law, to which we have adverted, at the date of the agreement; and we think that the engagement by Chandler not to build any mill within certain limits was a substantial concession by him.

If, therefore, the transaction were recent and had not been the subject of former discussion, we must hold upon his evidence that the charge of "dol" brought against Chandler had not been substantiated; but it must be remembered that, for some time after the agreement was made, it was acted upon by both parties; that its validity was first disputed in 1852, when Chandler was dead, though Cressé seems to have been living; that the grounds on which its validity was then disputed were the same with those laid in the present suit; that the case was decided against the respondent; and that he acquiesced in the decision. When the present suit was brought, Cressé as well as Chandler was dead. Under such circumstances, every presumption is to be made in favor of parties whose conduct is impeached after the death of both, and when all the explanations which might be desirable can no longer be afforded. It remains to consider the objection of error in the "*motif déterminant*" of the agreement. Error on the part of the respondent is alleged generally both as to matter of fact and of law. In what circumstances error will be a ground for setting aside or refusing to act upon an agreement generally, and an agreement of compromise in particular, and what the nature and effect of the error must be, seems to have perplexed alike judges in England and foreign jurists. The question here is to be determined exclusively by the French law, as it is applicable to compromises or transactions. The rule, as we collect it from the numerous authorities cited in the argument, appears to be this:—If the error relied on, be in a matter of fact, and the fact be one not included in the compromise, and of such a character that it must be considered the determining motive of either of the parties in entering into the agreement, its existence is regarded as a condition implied, though not expressed; and then if the fact fail, the foundation of the agreement fails. This seems to be the meaning of the language used by Toullier, b. 3, tit. 3, s. 42, and following articles. The instances which he puts are: if a compromise be founded on the genuineness of instruments which turn out to be forged; or if a suit, which it is the object of a compromise to determine, turns out to have been already decided in favor of one of the parties; or if a compromise be founded upon a will which turns out to have been revoked by another will of which the parties are ignorant. But he says, when the compromise is general of all matters in difference between the parties, then the rule of law is different, because it is not proved that the compromise would not have taken place although the parties had known that one of the points was not doubtful.

In such a case it is neither proved nor presumed that the compromise would not have taken place; and in case of doubt, "*erreur ne nuit qu'à celui qui était dans l'ignorance.*" The general rule

GROUNDS FOR ANNULING

then applies, "Error nocet erranti." We cannot say that in this case any mistake of fact has been proved on the part of the respondent, which, if it had been known, would have prevented the agreement. It is neither proved that Lavallée believed the part in question of the river Nicolet to be within the seigniorship of Chandler, nor that if he had known it to be within the seigniorship of La Baie, he would not have entered into the compromise. It appears to us to have been the intention of the parties to come to a general settlement of all the matters in dispute between them, without resorting to litigation in order to determine the various points of fact or of law upon which their rights might depend. As to the effect of error in law upon agreements of this description, art. 2052 of the Code Civil provides, "Les transactions ont entre les parties l'autorité de la chose jugée en dernier ressort. Elles ne peuvent être attaquées pour cause d'erreur de droit ni pour cause de lésion." This article in itself, of course, has no force in Canada, but it is merely an embodiment of the ancient law of France, as is clear from the chapter in Domat's Civil Law, tit "*Des Transactions*," and as is expressly stated by Merlin in the passage relied on by the respondent in the Répertoire, tit. "*Transaction*," sect. 5, art. 2, vol. 34, p. 371, he says:—"L'erreur de droit ne peut jamais servir de prétexte de faire rescinder une transaction. Les anciennes lois l'avaient décidé, et l'article 2052 du Code Civil dit expressément que 'les transactions ne peuvent être attaquées pour cause d'erreur de droit.'" As a general rule, this is not denied by the respondent. But he contends that there is an exception where a mistake has prevailed generally with respect to the law affecting whole classes of the community, and a compromise has been made founded upon such mistake. And it is said, that at the time when this agreement was made, the rights of the seigniors, with respect to non-navigable rivers and other waters within their seigniorships were universally considered to be much larger than they were afterwards found to be by the proceedings under the commission to which we have already referred, and that this mistake was the foundation of the agreement. In support of the proposition of law, a passage is referred to in Merlin's Répertoire, immediately following that which we have just read, and which is in these words:—"Si cependant l'erreur de droit avait été tellement générale que le législateur se fut cru obligé non-seulement de la faire cesser par une déclaration de sa volonté, mais encore de relever ceux qui l'auraient commise de tous les acquiescements auxquels elle aurait pu les entraîner, la transaction qui aurait été la suite d'une pareille erreur serait incontestablement nulle. C'est ce qu'a jugé un Arrêt du 24 Mars, 1807, rapporté au mot Communaux, s. 4." It is obvious, that if an act of legislation, correcting a mistake generally prevailing as to the law on a particular subject, at the same time expressly relieves parties who have acted on the mistake from the consequences of their acts, there is no question for a judge to decide; and this is the case stated by Merlin. It is true that the arrêt to which he refers states merely that the party was not bound by acquiescence in a decree arbitral, "puisque l'opinion générale était alors que les décisions d'arbitres forcés n'étaient point

GROUNDS FOR ANNULING

inattaquables par cette voie," that is, by way of cassation. Neither the general rule nor the particular case (of which the circumstances were very peculiar, and founded on the laws enacted by the revolutionary government of France in the years 1792 and 1793, in favor of the peasants against their lords) goes the length of establishing the principle contended for by the respondent, that a mistake of law as to rights of different classes prevailing generally at the time of a "transaction," is sufficient to annul a contract founded upon such mistake. Whether under any circumstances it would be sufficient to do so it is unnecessary for us to consider, because on referring to the proceedings, we are satisfied that the facts of this case afford no ground for any such question. On the contrary, a careful examination of these proceedings as they are stated in the Lower Canada reports, with which we have been furnished, convinces us that at the date of this compromise very great doubt prevailed as to the rights of the lords and their tenants respectively to the ownership and the use of non-navigable rivers, and as to the right to erect mills, and by means of dams to divert the water to such mills; and that there was no general recognition of the rights claimed by the lords. The thirty-seventh question put to the commissioners was in these words:—What was the jurisprudence followed in Lower Canada since the cession of the country in relation to the various rights claimed by seigniors in the waters which pass through, or border upon, the lands comprised in their respective "*censives*?" The legal proposition submitted on the part of the Crown was, "that although several judgments favorable to the pretensions of the seigniors on the matter have been pronounced, they are not such as the law requires to establish a jurisprudence;" and the opinion of the court is, "that there has been no established jurisprudence in Lower Canada since the cession in relation to the right in the waters which pass through or border upon the lands." There is no ground, therefore, in this case for any exception to the general rule, than an agreement of compromise is not vitiated by a mistake of either party in matters of law. Upon the whole, we have come to the conclusion that the judgment of the court below cannot be supported; that this agreement is to be dealt with upon the principles applied by French law to "*Transactions*;" that the withdrawal of the claim of Chandler to interfere with the dam, and the engagement to limit his right of building mills, constituted a sufficient consideration to support the agreement, and that no such proof has been given, either of "*dol*" or "*erreur*," as would authorize a court of justice to annul it. We must humbly advise her Majesty to reverse the judgment complained of, and to restore the judgment of the Circuit court; and we think that the appellants must have the costs in the Queen's Bench, and of this appeal. As this case is to be decided exclusively by the French law we have forborne to advert to the English authorities upon the subject. But we may observe that in the case of *Stewart v. Stewart* (6 *Cl. and Fin.* 911), in the House of Lords, which was a case from Scotland, a very careful examination took place of the principles to be applied to this subject; and Lord Cottenham came to the conclusion that the rules of

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the civil law had been, in effect, adopted into the law both of England and Scotland; and this appears to have been the case with the law of France.

TRUSTEE

See **TESTAMENTARY EXECUTOR.**

TURNPIKE ROADS

TRUSTEE FOR *See* **HIGHWAY : *iusdem verbis*.**

TUTORSHIP**LEGACY FROM WARD.**

MOSS ET AL V. LEATHAM ET AL ¹

32. A judgment was obtained by consent, fixing the share of three heirs in the estate of their father. One of the heirs, a minor, made a will in favour of her guardians. In a suit by the two other heirs to set aside the will, on the grounds that the will was obtained by undue influence, that the testator was a minor, and that the guardians could not benefit by the will of their ward, the Privy Council held, that the right of the guardians was unquestionable, and the will was maintained.

See **MINORITY.**

RELIGION AND STATUS OF MINOR CHILDREN.

SKINNER V. ORDE ²

33. A child, born in India, whose father was a European British subject and a Christian, must be presumed to have the father's religion, and his corresponding civil and social status; and is it the duty of a guardian to bring up his wards in his father's religion.

¹ *Dominica*, 1837 Nov. 29, 11 Moore 73.

² *Allahabad*, 1871 Dec. 12, VIII Moore N. S. 261.

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USAGE

MUST BE ADHERED TO

COWIE V. REMFRY¹

1. Their Lordships remarked in this case on the advisability of adhering to the acknowledged customs and usages, especially in commercial contracts.

THE RIGHT HON. DR. LUSHINGTON, p. 247 :—It may be true, that merchants dealing, *inter se*, are not bound by any customary mode of contracting, and that they may adopt another and different mode of contracting, if they think fit; but we are of opinion, that the presumption is strongly in favour of the custom, and that any alleged deviation therefrom must be strictly proved

P. 249:—We think that the established usage of dealing in the mercantile world, should be held in high respect, the very existence of such usage shows that in practice it has been found useful and beneficial; the presumption is in its favour, and no departure from it is to be inferred from doubtful circumstances, and especially not from circumstances, which, in the opinion of mercantile men generally, would not be conceived to produce any such consequences.

USURY

AGENT'S COMMISSION.

KIERZKOWSKI V. DORION²

2. Under the French law, there is an action to recover back from the lender any money received by him on an usurious contract in excess of the principal and legal interest.

3. In an action brought to recover a sum of money alleged to have been paid in excess, upon a contract for a loan of £4,875, made in the year 1845, of which £3,325

¹ Calcutta, 1846 Feb. 11, V Moore 247.

² Lower Canada, 1868 Dec. 4, V Moore N. S. 397.

AGENT'S COMMISSION.

only were paid to the borrowers, the balance, £1,500, being retained by the agent of the lender as a *bonus* or *premium*, the Judicial Committee held, that no sufficient proof having been made of the lender's knowledge of the retention of such commission, and no excess of payment on account of interest, before the year 1853, when the law of usury was repealed having been established in evidence, the action could not be maintained.

4. An action of this nature is assignable.

LORD CHELMSFORD, p. 420:—It seems clear, that by the old French law which prevailed in Lower Canada, when, upon an usurious contract, the principal and legal interest have been fully paid, any money afterwards received by the lender beyond the legal amount due may be recovered back from him. (*Pothier, Traité de l'usure*, IV, p. 114, art. 113.) A right of action, therefore, is vested in the person so paying such usurious interest; and by the law of Canada such right of action is assignable.

PAGE 428.—At the time of the agreement for the loan, the Act respecting usury, which was in force in Lower Canada, was that of 1777.

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1 The law of 1777 against usury was repealed by 22 Vict., ch. 83 (1853).

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ALTERATIONS, OBLITERATIONS, INTERLINEATIONS.

GREVILLE V. TYLEE ¹

1. The fact that the amount bequeathed or the name of a legatee, or the description of the property, etc., is written in different ink, and in a different hand-writing, does not alone constitute an obliteration, interlineation, or other alteration, within the meaning of the statute, nor does any presumption arise against a will being duly executed as it appears.

2. The case is different where there is an erasure apparent on the face of the will, and that erasure has been superinduced by other writing. In such circumstances, by the statute of wills, 1 Vict., ch. 26, sect. 21, the *onus probandi* lies upon the party who alleges such alteration to have been done prior to execution, to prove by extrinsic evidence that the words were inserted before execution, and that they had the sanction of the testator. See EVIDENCE : *presumption*, *Cooper v. Bockett*.

CAPACITY OF MIND

TUFNELL ET AL V. CONSTABLE ET AL ²

3. Weakness of mind and forgetfulness are not sufficient to invalidate a will, if it is proved that the mind of testator was, when called to exertion, capable of executing any business requiring capacity, attention and application.

HARWOOD V. BAKER ³

4. A will was set aside and probate refused because proof was made that the testator's mind was of a weakened and impaired capacity, at the time of the writing of the will, from a disease affecting the brain, which produced torpor,

¹ Canterbury, 1851 Feb. 8, VII Moore 320.

² England, 1835 April 11, III Knapp. 122.

³ Canterbury, 1840 Dec. 17, III Moore 290.

PAGES
See Evi-

ANCE : *iusdem*
AL LAW : *ius*

ESTING A.... 864
ATE OR TO 870
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32 (1853).

CAPACITY OF MIND.

and rendered his mind incapable of exertion unless roused. The will was executed by the testator on his deathbed in favour of his wife, to the exclusion of the other members of his family, which was a total departure from, and contrary to the previous expressed intentions of the testator.

MR. JUSTICE ERSKINE, p. 290:—But their Lordships are of opinion, that in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property; and that the protection of the law is in no cases more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid, as to shut out all others that might require consideration.

AUSTEN V. GRAHAM ¹

5. It is not sufficient in order to prove insanity and incapacity to make a will to establish by evidence that a testator was labouring under a sickness that caused him great sufferings, that his appearance, manners, and language were strange and wild, and that his will was extraordinary.

6. The testator was an Englishman who had adopted the habits and the faith of the Hindoos. By his will after bequeathing several legacies, he gave the residue of his property to the Turkish Ambassador or representative, in part for the poor, and in part to erect a cenotaph with a light burning, and a description of the testator.

7. What might appear absurd and irrational in a native Christian, might not necessarily bear the same character when proceeding from a native Mahometan, or from one who, from an early period, had adopted its manners and modes of life, and who entertained or professed a belief in Mahomedanism.

DIMES V. DIMES ²

8. In a case where from illness the testator's mind fluctuated, and at times exhibited an excitement which amounted to unsoundness of mind, a will and codicil made in accordance with the intentions of the deceased expressed in a former testamentary instrument and of his declarations and the state of his affections, was admitted to probate, the

¹ Canterbury, 1854 Feb. 22, VIII Moore 493.

² Canterbury, 1856 June 21, X Moore 422.

CAPACITY OF MIND.

fact of a lucid interval at the time of execution being established.

9. The difference, in a question of fluctuating capacity and partial recovery, between unsoundness of mind partaking of the nature of mental derangement, manifesting itself in insane delusion, and unsoundness of mind caused by fever, which produces delirium, observed upon.

THE RIGHT HON. F. LUSHINGTON, p. 428:—Unsoundness of mind may be produced by various causes. A man may be of unsound mind when he labours under delusions, or from excess of fever which produces delirium, or when in a comatose state. When an individual entertains delusions, he is more properly said to be insane than when he is temporarily affected by delirium or excess of fever, but unsoundness of mind arising from insane delirium is very different from that occasioned by fever or excess. Delusions are of a more permanent character, and when once proved to have been entertained, stronger and more conclusive evidence is required to show that the mind has been relieved from them. Not so when the moving cause is delirium or excess of fever. Such causes are in the nature of a more temporary character, more likely to yield to medical treatment, and there is more probability of cure.

PRINCESS AND THE EAST INDIA COMPANY V. DYCE SOMBRE ET AL.¹

10. Soundness and unsoundness of mind must be considered at the periods of giving instructions for and of the execution of the will and codicil, and the question may be determined by the conduct of the testator at those particular times; but where the testator was under the protection of a commission of lunacy at the time of his death, it is necessary to make an inquiry: *first*, as to the testator's birth and origin; *secondly*, into the testator's early history and education; *thirdly*, as to the testator's society and habits up to his death; *fourthly*, as to the testator's character and personal conduct.

11. Insane delusions are of two kinds: the belief in things impossible; and the belief in things possible, but so improbable under the surrounding circumstances, that no person of sound mind would give them credit. The carrying to an insane extent impressions not in their nature irrational, may also be added.

THE RIGHT HON. F. LUSHINGTON, p. 276:—In testamentary cases the giving instructions for any testamentary instrument is often, we might say generally, the most important part of the transaction, for frequently the execution is little more than a matter of form. It is necessary, therefore, to scrutinize closely the evidence applicable to

¹ Canterbury, 1856 April 16, X Moore 232.

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the instructions—we mean the evidence applying to the state of mind of the deceased when he gave such instructions; not to the contents of which hereafter.

It is necessary to bear in mind what is well known to those versant with disputed wills, namely, the clear distinction between the examination into the capacity of a testator, and his soundness of mind. They are very different cases, and though capacity in ordinary language might include everything necessary to prove a power of testation, yet in the more restricted sense used in the Prerogative Court they have been held distinct.

For instance, in cases where no insanity has either existed, or been supposed to exist, the inquiry into the capacity of a testator in extreme old age or enfeebled by long illness, or when death is fast approaching, simply is, whether the mental faculties retain sufficient strength fully to comprehend the act about to be done; but when lunacy or unsoundness of mind has previously existed, the investigation is of a totally different character. In such a case, though there may be latent disease, the mental faculties may be apparently in full vigour, the power of apprehension and of memory may be wholly unaffected, and then the object is to investigate and ascertain whether the delusions which had once existed in the mind are wholly removed.

See EVIDENCE : *probate of wills*.

COMPENSATION UNDER SLAVES ABOLITION ACT.RICHARDS V. ATTORNEY GENERAL OF JAMAICA ¹

12. At the time of the abolition of slavery in all the British colonies (1834), by 3 and 4 Will IV, the law provided for a compensation.

Held, that this compensation must be considered as personal estate of a testator and not as a real estate, and might be as such devised by a will attested to pass personalty only.

CONSTRUCTION OFTHE MAYOR OF HAMILTON V. HODSDON ²

13. The word "estate" when used in a will, is *genus generalissimum*, and will, of its own proper force, without any proof *aliunde*, of an intention to aid the construction, carry realty, as well as personalty, and is not to be confined and restrained to personalty only; unless there is a clear intent expressed, in other parts of the will, to be gathered either from the whole will, or from the way in which the word is used in the particular part of the will where the contested use of it arises; or in some other way it is shown

¹ Jamaica, 1848 July 8, VI Moore 381.

² Bermuda, 1847 Feb. 16, VI Moore 76.

CONSTRUCTION OF

to be restricted to mere personal estate, contrary to the strict usual, and now established force, effect, and value of the word.

TOWNS V. WENTWORTH¹

14. A testator in his will bequeathed all his property to his children, "in such manner that the same shall be enjoyed by them respectively only for and during the period of their natural lives; in order, therefore, to limit the same strictly in entail on them my said children, and to their several and respective heirs of their bodies respectively." The real estate was devised, in trust, to trustees, for one of his sons for life, "and after his decease the same to go and descend to his first and other sons and daughters in tail, in order of primogeniture, males to be preferred to females, and to the several and respective heirs of their bodies, so that each possessor shall take only a life estate and interest in the same." And in the event of his son's decease without issue, then the trustees were to allow his other children, whom he enumerated, "to possess and enjoy the same, strictly limited to life interest, and in tail, to each of them respectively, in the order of primogeniture males to be preferred to females."

The Judicial Committee held, that the son took an estate for life only, and that on the decease of any of the respective devisees in the will mentioned, without issue, the hereditaments devised to him or her respectively, vested in the eldest of the children of the testator, in the order named in the will, for life, with a vested remainder in his or her first and other sons and daughters in tail, in the order of primogeniture, males to be preferred to females; and, in the event of such eldest of the children of the testator being then deceased, leaving issue, then immediately to such issue in remainder as last aforesaid.

THE RIGHT HON. T. PEMBERTON LEIGH, p. 543:—In order to determine the meaning of a will, the court must read the language of the testator in the sense which it appears he himself attached to the expressions which he has used, with this qualification, that when a rule of law has affixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the testator has by his will excluded, beyond all doubt such construction. When the main purpose and intention of the testator are ascertained to the satisfaction of the Court, if particular expressions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law

¹ New South Wales, 1858 Feb. 16, XI Moore 526.

CONSTRUCTION OF

will not permit to take effect, such expressions must be discarded or modified; and, on the other hand, if the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole will, sufficiently declared.....

PAGE 547 :—But when the limitation to issue of the first taker includes all the issue which can come into existence, if the will be read as speaking at the death of the testator, it is admitted, that there is no case in which it has ever been held that any other issue can be intended.....

P. 550 :—Now, a Court is not justified either in inserting or striking out words, or in any manner altering the language of a clear devise upon mere conjecture; upon the mere ground that the devise seems capricious, and that a gift in other terms would be more in conformity with other dispositions contained in the Will. *Ginger v. White, Willes, 348; Blackburn v. Edgely, 1 P. Wins. 605; Baker v. Tucker 3 H. L. Cases 106.*

DOE DEM. BRODBELT V. THOMPSON¹

15. The rule in construing a will is not to venture into conjecture, but to find out the intention of the testator from the terms of the will and surrounding circumstances.

16. In a devise of property in fee with an executory indefinite devise over, the last devisee takes a life interest only.

LORD JUSTICE TURNER, p. 127 :—Their Lordships cannot but think it probable that this was the intention of the testator, and if they felt themselves at liberty to indulge in conjecture, they would, probably, adopt that conclusion; but it is upon intention, either expressly declared or collected by just reasoning upon the terms of the instrument, or evidenced by surrounding circumstances, where surrounding circumstances can be called in aid, and not upon conjecture merely, their Lordships feel bound to proceed. The strict observance of this rule, unimportant as it may be in particular cases, is of the highest importance, when considered generally, with reference to the rights of property; for if it be not strictly observed, those rights will become dependent upon the mere arbitrary will of the judges whose duty it may be to adjudicate upon them.....

P. 129.—It seems to be well settled that, under a devise of a house in fee with an executory devise over, indefinite in terms, the devisee over takes a life estate only in the event of the executory devise taking effect. The law does not in such a case give effect to any presumed intention on the part of the testator that the devisee over should take the same estate as the prior devisee would have taken, and their Lordships can see no reason why such an intention should

¹ Jamaica, 1858 June 18, XII Moore 116.

CONSTRUCTION OF

be presumed and should take effect in a case like the present, if it cannot be presumed and cannot take effect in the cases referred to.

QUAYLE V. DAVIDSON¹

17. In construing a will, a court of equity will look at the circumstances existing at the date of the will, and, according to these circumstances, words importing a trust may be construed as expressions of hope, confidence, or recommendation.

18. A testator bequeathed his real property, consisting of a farm, to his wife for life, and after her death to a trustee with the following provision: "in trust for his son being brought up to work the farm," and made a gift over in the event of the trustee having no male issue. The trustee had no male issue at the date of the will, but had a son born after the testator's death.

The Judicial Committee held, that, under the will, the trustee's son did not take any beneficial interest in the real estate, the words "in trust for his son being brought up to work the farm" being a mere recommendation, or expression of hope or confidence, that his eldest, or only son, should be brought up to work the farm.

MARTIN V. LEE²

19. The paramount duty of courts of justice in construing wills is to ascertain and give effect to the intention of the testator or testatrix, to be collected from the whole will, and not from any particular word or expression which may be contained in it.

20. This rule should prevail against well established rules of construction, such as that that the word *enfants* in a will includes *petits-enfants* especially where the will is written in English, seeing that in English law, this signification of the word "children" is not given such an extension.

21. By the will to be construed, the testatrix, devised and bequeathed her real and personal estate to her husband for his life, and after his decease to her children, living at the time of her decease. Five children were living at the time of the testatrix's death, three of whom were minors, and one grand-child, the issue of a daughter of the testatrix who had pre-deceased her. In an action of account and partition brought in Lower Canada, by a grand-child as a legatee under the will, the courts there declared that the

¹ Isle of Man, 1958 Nov. 30, XII Moore 268.

² Lower Canada, 1860 November 30, XIV Moore 142.

CONSTRUCTION OF

word "children" in the will, was equivalent to the French word "*enfants*" which term by the old French law comprehended grandchildren, and held the grandchild entitled to take under the will.

The Judicial Committee reversed this judgment because upon the true construction of the will, the intention of the testatrix was manifestly to restrict the gift to her children, which intention countervailed the general force given to the word "*enfants*," by the old French law.

22. This will being written in the English language, it was the duty of the courts in Lower Canada to ascertain what, according to the English law, was the meaning of the word "children," following in their decision of the case, the law of domicile, but resorting to the Foreign, i. e. the English law, or language, for the purpose of deciding the meaning of the particular word used in the will.

LORD TURNER, p. 153: — Their Lordships, after having fully considered this case, find themselves unable to agree with the conclusion at which the courts in Canada have arrived upon the construction of the will. That a more extensive signification is frequently given by the old French law which prevails in Canada to the word "*enfants*" than is generally given by the English law to the word "children," their Lordships do not doubt; but they are satisfied that by the old French law, no less than by the English law, the paramount duty of the courts in construing wills is to ascertain and give effect to the intention of the testator or testatrix, to be collected from the whole will, and not from any particular word or expression which may be contained in it; and extensive as has been the signification which the old French law has in many cases given to the word "*enfants*," their lordships accordingly find that in cases where it has sufficiently appeared that that word was intended to embrace only the first generation of issue, it has been so confined in construction, of which the following case is an example: *Invitatis ad fidei commissum liberis qui ex Titio et Sempronia nascerentur, soli primi gradus liberi non etiam nepotes invitati videntur, quia licet liberorum appellatione continentur adeoque filiorum cum de favore et commodo ipsorum agitur, illud tamen non minus verum quam tritum est, articulo ex non nisi proximam et immediatam causam significari; ut perinde sit ac si fidei commissum iis duntaxat relictum esset, qui ex Titii et Semproniae corporibus nascerentur, quo casu apertius est creditos eos videri non posse qui non ex Titio et Sempronia sed ex eorum liberis suscepti essent.* This case is to be found in 4 Burge's Comments, 567, but their Lordships refer to it only by way of example. There are many other cases to the like effect to be found in the books. The true question, therefore, in this case is, not whether the word "*enfants*" may include grand-children, and even more remote descendants, but whether, upon the true construction of this will, it was intended to include them, and their Lordships are perfectly satisfied that it was not so intended by the testatrix.

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It appears to their Lordships to be clear that throughout this will the testatrix was referring to her own children, and to her own children only. She gives a life-interest to her husband in all her property, plainly looking to him for the maintenance of the children, for she provides against the event of his marrying again, and provides also for the maintenance of the children in the event of his dying before they should be of age. Again, the children to take are to be children of her marriage, and they were to be living at her death; which at least tends to show that she could not be referring to her daughter, whom she must of course have known to be dead. Her husband, too, was to be appointed tutor to her children. These indications of the testatrix's intention are, in the judgment of their Lordships, abundantly sufficient to countervail the general force of the word "*enfants*," and are so manifest that their Lordships feel bound to give effect to them. They have dealt with this case upon the footing not only that it ought, as of course it ought, to be decided according to the law of Lower Canada, but that according to that law it ought to be disposed of as it has been in the courts there, upon the footing of the will being rendered into French, and the word "children" read "*enfants*," but their Lordships desire to be most distinctly understood as not having intended to decide that the case ought to have been dealt with upon that footing. That mode of dealing with the case is open to all the inconveniences pointed out by Mr. Justice Story, in his invaluable work, on "*The Conflict of Laws*," secs. 275 and 276, and by Lord Lyndhurst in his judgment in *Trotter vs. Trotter* (4 Bli. N. S. 505); and it may well be that this will having been written in the English language, the proper mode of dealing with the case may have been for the courts in Canada to ascertain what, according to the English law, was the meaning of the word "children," as used in the will, the law of the domicile, according to which the case must, of course, be decided, resorting to the foreign law or language for the purpose of deciding the meaning of the words used in the will. This, however, is a question of great importance, more especially having regard to the number of foreigners domiciled in this country, and of Englishmen domiciled abroad, who may prepare their wills in their native languages; and their Lordships are anxious to be understood as having given no opinion upon the point, which was not, indeed, fully argued. It is sufficient to say that, taking the case in the view most favourable to the respondent, the judgments of the courts in Canada cannot, in their Lordships' opinion, be supported.

They will, therefore, humbly recommend to Her Majesty to reverse the decree of the court of Queen's Bench, and to substitute for it a decree dismissing the suit without costs, and to give no costs of the appeal.

MAUGER V. LE GALLAIS¹

23. The law of Jersey requires that to be valid a will containing a legacy of immoveables must be signed before

¹ Jersey, 1867 June 22, 1V Moore N. S. 395.

CONSTRUCTION OF

two witnesses who must also sign, and no attestation on the part of the witnesses is valid unless it is dated.

24. To a will disposing of real estate, an attestation clause was appended as follows: "*Le présent testament olographe a été signé par le testateur en notre présence, et nous y avons apposé notre signature, comme témoins, en présence du dit testateur, et en présence l'un de l'autre, le dit jour.*"

The Judicial Committee held, that as there was only one date in the will which was the date of the will itself, the words "*le dit jour*" in the attestation clause, referred sufficiently to the date contained in the will to comply with the requirements of the law.

BARLOW V. ORDE ¹

25. In English law, under a testamentary gift to children, illegitimate children, although recognized by the testator in his life-time, cannot be permitted to share with legitimate children. This rule does not apply in India to a person domiciled there. The word "children" in a will made by a resident in the North-Western provinces of India includes illegitimate as well as legitimate children, whenever such illegitimate children are acknowledged or treated as his children by their putative father.

LAGESSE V. LAGESSE ²

26. A testator made in his will the following disposition: "*J'ai reconnu pour mes enfants naturels, etc; et je donne et je lègue à ces enfants la moitié de tous les biens généralement quelque que je laisserai au jour de mon décès.*" The children were legitimated by the subsequent marriage of the testator with their mother. By the law of Mauritius, the testator could only dispose by will of one-third of his property.

The Judicial Committee, in construing this clause, held, that the legacy given to the children referred to half of the whole estate and not to half of the *quotité disponible* only; and that the children had to elect between their *quotité disponible*, two-thirds, or the legacy, one-half.

YEAP CHEAH NEO V. OUG CHENG NEO ³

27. A will contained the following disposition "as regards the remainder of my real and personal property of what kind soever, not already disposed of, I direct that my exe-

¹ Lahore, 1870 Jan. 29, VI Moore N. S. 437.

² Mauritius, 1877 Dec. 20, IX Moore N. S. 399.

³ Penang, 1875 July 28, L. R. VI P. C. 381.

CONSTRUCTION OF

"utors shall receive and collect the same from all persons
"whatever, and in such manner as to them may seem
"proper, and I direct that they, their heirs, successors, re-
"presentatives, or descendants, may apply and distribute
"the same, all circumstances duly considered, in such
"manner and to such parties as to them may appear just."

The Judicial Committee held, that this will, under the English law regarding wills in force in Penang, gave no personal right to the executors and was not an absolute gift to them individually.

28. The following legacies made by the same will were set aside by the court :

1° A gift of the upper story of four shops, in trust, for a family residence of certain named persons, was declared null for uncertainty and as infringing the rules against perpetuities.

2° A devise of two plantations, in trust, to be reserved as a family burying place, and not to be mortgaged or sold, declared void as infringing the rules of perpetuities.

3° Another devise directing that a house should be built to perform therein religious ceremonies for the testatrix and her deceased husband, was declared void for the same reason and because said trust did not refer to a charitable object. *Ellis v. Selby*, 1 *My. & Cr.* 298; *Morice v. Bishop of Durham*, 10 *Ves.* 535; *Gibbs v. Rumsey*, 2 *V. & B.* 294; *Buckle v. Briston*, 10 *Jur. (N. S.)* 1095; *Grenada v. Stewart*, 2 *Mer.* 143; *Mayor of Lyons v. East India Co.*, 1 *Moore P. C.* 175; *Thompson v. Shakespear*, 1 *F. D. & J.* 393; *Came v. Ling*, 2 *D. F. & J.* 75; *West v. Shuttleworth*, 2 *M. & K.* 684; *Rickard v. Robson*, 31 *L. J. (Ch.)* 896; *S. C.* 31 *Beav.* 244; *Hoare v. Osborne*, *Law Rep.* 1 *Eq.* 585.

ARMYTAGE V. WILKINSON¹

29. The word "vest" may, if the context of the will is in favour of that construction, be read as importing only that the interest previously vested during a specified time is to become absolute and indefeasible. *Taylor v. Frobisher*, 5 *de G. & Sm.* 191; *Berkeley v. Swinburne*, 16 *Sim.* 275; *Poole v. Bolt*, 11 *Hare* 33.

VIAS V. DELIVERA²

30. Under the Roman-dutch law, the personal property of the wife is ordinarily, in the absence of special ante-nuptial contract, held by the spouses as partners, each on the death

¹ Victoria, 1878 Feb. 23, L. R. III Appeal Cases 355.

² Ceylon, 1879 Dec. 19, L. R. V Appeal Cases 123.

CONSTRUCTION OF

of the other being entitled to his or her share, while in the English law the whole personal property of the wife, including *choses in action* becomes the absolute property of the husband.

31. A joint will is considered in English law as one will. According to Roman-dutch law it is two wills each disposing of the share of the testator respectively. Therefore, where a will of a wife in India, directing that the estate should be divided between her husband, their daughter and her then existing child, it must be construed as giving one third to each of them.

32. The words "children which may hereafter be procreated" applies to children to be born between the date of the will and the death of the testator.

GIBBONS V. GIBBONS¹

33. The proviso construed in this case reads as follows: "Provided always, that if any person whom I have made tenant in tail male of my said estate shall be born in my lifetime, then and in such case, I revoke the devise so made to him. In lieu thereof I give and devise the hereditaments comprised in such devise and appointment to the use of the same person respectively for the term of his or her natural life, and after his as her decease, to the use of his or her first and every other son successively, according to their respective seniority in tail male."

The words of this proviso must be construed according to their grammatical sense, and be taken to mean a "tenant in tail male born" after the date of my will and not before. *Loring v. Thomas*, 1 Dr. & Sm. 523; *In re Sheppard's Trust* 1 K. & J. 276; *Sturges v. Pearson*, 4 Madd. 411; *Trapper v. Meredith*, Law Rep. 7 Ch. 248; *Giles v. Melson*, Law Rep. 6 H. L. 31.

STRICKLAND V. MARCHESI FELICISSIMO APAP²

34. The general rule governing the succession to a primogeniture was in this cause laid down as follows: "To succeed in primogenitures, in the absence of any particular rule, one must consider, in the first place, the line, in the second place the degrees, in the third place the sex, and in the fourth place the age."

35. But in construing a will, the Judicial Committee, in this appeal, preferred the sex to line and degree. The rule was, therefore, modified in its application as far as

¹ New South Wales, 1881 May 14, L. R. VI Appeal Cases 471.

² Malta, 1882 Feb. 10, L. R. VIII Appeal cases 107.

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the terms of the will rendered it necessary, but no farther; the principle still obtains, when it is not at variance with the terms of the instrument, that line is to be preferred to degree and age. *Rohan v. Drito Municipale di Malta, B. iv. c. II, s. 10*; *Farre, vol. I, set. 5, p. 51*.

RHODES V. RHODES¹

36. A will may be rejected *in toto* or in part if it is proved that although it was executed by the testator in a formal manner, yet either by error or by fraud, it does not contain his intentions.

LORD BLACKBURN, p. 198:—When an instrument purporting to be the will of the deceased person has been executed by the deceased in the proper manner, but it is sufficiently proved that though he executed the instrument, yet that from fraud he executed that which was not his will there is no difficulty in pronouncing that the instrument is not his will. And it has been held that when it is sufficiently proved that the instrument comprised his will, but that from fraud, or perhaps from inadvertance such as that—*In the goods of duave*, the instrument which he actually executed contained also something which was not his will, this latter part is to be rejected.....

A much more difficult question arises where the rejection of words alters the sense of those which remain.....

P. 199:—Their Lordships think that there is no difference between the words which a testator himself uses in drawing up his will, and the words which are *bonâ fide* used by one whom he trusts to draw it up for him. In either case there is a great risk that words may be used that do not express the intention. There probably are very few wills in which it might not be contended that words have been so used. However this may be, the court which has to construe the will must take the words as they find them.

P. 205:—The rule on which the appellant relies is that universally recognised and acted on, namely, that words are to be construed according to their plain ordinary meaning unless the context shews them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity, indeed, the latter branch of the rule is, perhaps involved in the former for, supposing that the rule, if acted on, would lead to manifest absurdity or incongruity, the context must be considered to shew the words could not have been used in their ordinary sense.

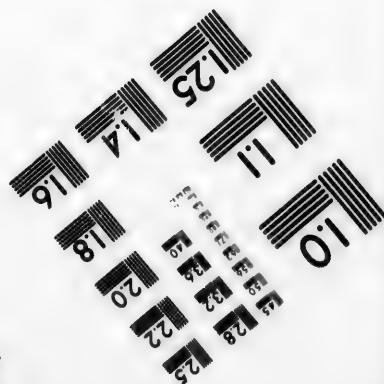
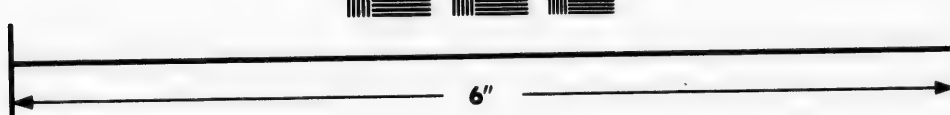
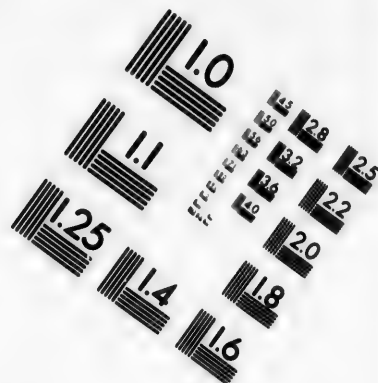
MCGIBBON V. ABBOTT²

37. A will executed in the province of Quebec by a person domiciled therein, with reference to a portion of an

¹ New Zealand, 1882 March 8, L. R. VII Appeal Cases 198.

² 2 Sw. & T. 590.

³ Quebec, 1885 July 18, L. R., X Appeal Cases 653.



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CONSTRUCTION OF

estate situated in the province, must be interpreted according to the law of the province, and not according to English law, though the will be in the English language and be couched in English legal phraseology. *See WILL: exclusion of children. Same case.*

DE JAGER V. DE JAGER ¹

38. A testator devised his property to his two sons and provided that "the eldest son among our grand children shall always have the same right thereto, and after the decease of their parents remain in possession thereof, with this understanding, however, that the other heirs who may still be born shall enjoy equal share and right thereto."

Held, that the words "the other heirs" did not apply to the grand-children, but to the children, and that the eldest son of the children, there being but two, were entitled each to a moiety of the estate.

LEWIN V. KILLEY ²

39. The testator gave a house to trustees upon trust to permit his wife to receive half of the rents and profits for her life, and his daughter therein named, the other half. Upon the decease of the wife, the trustees were directed to transfer the house to the daughter, her heirs and assigns for ever, and then follows this direction: "And it is my will and desire, that if any of my said children shall die without leaving lawful issue then surviving, that the property hereby devised and bequeathed to each of my said children shall be equally divided amongst my surviving children." The daughter having survived her mother, died without lawful issue.

The Judicial Committee held, that the words "shall die without leaving lawful issue" must be confined to the time during which the absolute interest has not been conferred, but when that is once conferred the trust and the period of suspense is closed, and the possession is not to be disturbed.

EXCLUSION OF CHILDREN.

McGIBBON V. ABBOTT ³

40. When a testator devised all his property, real and personal, to trustees with instructions to pay the revenues thereof to his son during his life, and to divide the capital

¹ Cape of Good Hope, 1886 Feb. 25, L. R. XI Appeal cases 411.

² Isle of Man, 1888 July 27, L. R., XIII Appeal Cases 783.

³ Quebec, 1885 July 18, L. R. Appeal cases 655.

EXCLUSION OF CHILDREN.

among his children at his death, in such proportion as he, his said son, should decide by his will, a division among four of the children to the entire exclusion of the fifth, was a valid exercise of power under the will.

SIR BARNES PEACOCK, p. 657:—The case was heard in the first instance in the Superior Court, when Mr. Justice Torrance decided in accordance with that view of the case.

On appeal to the court of Queen's Bench, that court, consisting of Chief Justice Dorion and four other judges, reversed the decision of the Superior court, and unanimously held, that John Octavius Macrae had not only the right to apportion the capital between all his children, as well those of his then existing marriage as those of any future marriage, but also the right to dispose of the property in favor of one or more of his children to the exclusion of the others, as he had done by will. From that judgment the plaintiff has appealed to Her Majesty in Council, for the following amongst other reasons:—

1. By the law of Lower Canada the Court is bound to give effect to the intention of the testator as evidenced by the whole will. *Martin v. Lee*, 14 Moore, P. C. C., 142
2. That in the case of a will in the English language and couched in English legal phraseology, it was proper for the Courts of Lower Canada, in accordance with the case of *Martin v. Lee*, to have regard to the meaning and effect of that phraseology in the English language and law at the date of the will, in order to arrive at the intention of the testator.
3. That at the date of the execution of the will and down to and at the date of the death of the testator, the language of the said will would by the law of England, as it then stood, have given no right to John Octavius Macrae to exclude any of his children, but only to direct the proportions in which they would share.
4. That it appears from the will to have been the intention of the testator to benefit all his said grandchildren, and to give their father a power only to apportion but not to exclude.
5. That there is nothing in the law of Lower Canada opposed to this construction or to this intention.

The reasons of Mr. Justice Ramsay for his judgment in the court of Appeal are set out in the supplemental record, and it appears from a letter from the Clerk of Appeals in Montreal to the Registrar of the Privy Council that Mr. Justice Ramsay rendered the unanimous judgment of the court of Appeal, and that the other Judges have no notes, and have not sent any reasons for their concurrence in the judgment.

As to the first reason for the Appeal to Her Majesty in Council, there can be no doubt that, according to the law of Lower Canada, as well as according to the law of England, "the paramount duty of the Courts" (to use the words of Lord Justice Turner in the case of *Martin v. Lee*, 17 Moore's Privy Council Cases, 153) is to ascertain "and give effect to the intention of a testator to be collected from "the whole will, and not from any particular word or expression

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WILL: exclusion

R. V. DE JAGER¹
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WIN V. KILLEY²
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BBON V. ABBOTT³
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EXCLUSION OF CHILDREN.

"which may be contained in it." But it is not their duty, by adhering to the strict letter of a will, so to construe general words as in the absence of clear and unambiguous language to impute to a testator an unreasonable intention.

The doctrine of the English courts of Equity as to illusory or unsubstantial appointments under a power is not, and never was, any part of the old French law, or of the law in Lower Canada, nor is it included in any of the Articles of Chapter 4 of the Civil Code of Canada, relating to substitutions.

The question whether John could exclude any one of his children from a share must, in their Lordships' opinion, be decided according to the law of Lower Canada, and not according to the English law. They do not understand the case of *Martin v. Lee* as deciding that a will executed in Lower Canada by a person domiciled in Lower Canada, if written in English, must be interpreted with regard either to moveable or immoveable property in Lower Canada according to the rules of English law, and have the same effect given to the phraseology as if that phraseology had been contained in a will executed in England by a person domiciled in England, or relating to land or other property in England. All that they understand that case to decide is that the word "children," used as it was in the will then to be interpreted, was not intended to have the more extensive meaning which may sometimes be given to the word "*enfants*" in the old French law.—Lord Justice Turner, at p. 154, said: "The true question therefore in this case is not "whether the word "*enfants*" may "include grand children and even more remote descendants, but "whether upon the true construction of this will it was intended to include them." See also the remarks at pp. 154 and 155.

It could never have been intended by their Lordships to lay down a rule of construction which might render it necessary to apply the rule in *Shelly's* case to a conveyance or devise written in the English language of lands in Lower Canada to a man for life, with a substitution in favor of his heirs upon his death.

The question to be considered is whether, according to the law of Lower Canada, the gift in the will of William, by the words, "and, "secondly, upon the death of the said John Octavius Macrae, the "capital thereof to his children in such proportion as my son shall "decide by his last will and testament," contained an exclusive or non-exclusive power. It may be said that, according to the words taken in their strict grammatical sense, each child was entitled to a share; but it is to be borne in mind that, as the old English rule of equity as to illusory appointments was not in force in Lower Canada, John, even if the power is to be construed as non-exclusive, might have given a share of one cent each to four of the children, and the whole of the remainder to the other. In other words, that \$100,000, the amount at which the property is valued by the plaintiff, *minus* four cents, might have been given to one of the children, and one cent, or a share in the proportion of one to ten millions, might have been given to each of the others.

It is to be observed that at the date of his will John had only the four children, amongst whom he thereby decided that the property

EXCLUSION OF CHILDREN.

charged should be divided. His decision at the time was quite in accordance with the will of his father, whatever construction is to be put upon it. He was not bound at that time to make by general words provision for a child who might be afterwards born. He was not bound to make his decision *uno flatu* (see *Cunningham v. Anstruther*, 2 Law Reports, Scotch and Divorce Appeals, p. 223). He might have revoked the will and made a new will, or he might have amended it by a codicil; and all doubt as to the validity of the will which was made before the birth of the plaintiff would have been removed if John had executed a codicil amending his will by giving one cent to the plaintiff, and the remainder to the four children named in the will.

William, if he had pleased, might have provided by express words that each child of John should have a share, and that no share should be less than a certain amount, but he was not prepared to fix the amount of the shares. To hold that when he left to his son to fix the proportion he intended to render it compulsory upon him to give each child a share, though it should only be in the proportion of one to ten millions, would be to impute to him a most unreasonable intention. To do so would violate the rule of interpretation. *Qui hæret in litera hæret in cortice.*"

In England, Lord Alvanley in the case of *Kemp v. Kemp* (5 Ves. Jun., 861), in holding a power to be non-exclusive upon finding a current of authorities against the words being construed as giving an exclusive power, observed: "My inclination is strong to support the execution of the power if I could consistently with the rules I find established;" and on referring to the case of *Burrell v. Burrell*, in which a testator gave all his real and personal estate to his wife, to the end that she might give his children such fortune as she should think proper," remarked: "Lord Camden, as I conceive, was of opinion that these words were so ample that if she thought fit to give nothing to one she might so execute the power. I am willing to subscribe to that opinion of Lord Camden upon such a doubtful question, being perfectly satisfied that in setting aside these appointments, by criticising the words 'to and amongst,' &c., and the rule as to illusory shares, the court goes against the intention. I must therefore think that, under the words of that will, Lord Camden thought that the wife might have given the whole to one child, and had a right to exclude any who, in her opinion, did not want it." In the case then before him, Lord Alvanley held that the power was non-exclusive, but at the conclusion of his judgment, having given his reasons at length, he added: "For these reasons, but with less satisfaction than I have had in any other judgment that I have given, being satisfied that the person creating the power meant a much larger power than I can hold the person executing it had, I must declare the appointment void."

In Sugden on Powers it is said, "In many cases an exclusive appointment may be authorized by the apparent intention of the donor, although no words of exclusion are expressly used. Thus, he says, in *Bovil v. Rich*, 1 Chan. Cases, 309, the testator gave all the rest of his estate to A B in trust, to give my children and

EXCLUSION OF CHILDREN.

"grandchildren according to their demerits." A B gave the estate "to one, excluding the rest. Lord Nottingham refused to set aside the appointment, as the children were to come in by the act of the devisee, and he was to give or distribute according to their demerits, therefore he was to judge." So in the present case John was charged with the fiduciary substitution and was to decide.

It was contended in the argument at the bar that John could not properly decide with reference to the plaintiff without considering his case, and that as his will was executed before the plaintiff was born he must have decided without considering. This is not so. He had the power to revoke or alter his will, and if he had thought that the plaintiff ought to have a substantially proportionate share, or even a nominal share, he could have decided in his favor by a codicil. In Domat's Civil Law, Part 2, Book 5, para. 3877, it is said, and with very good reason: "If he who was charged with a fiduciary bequest or substitution at the time of his death in favour of some one of his children whom he should think fit to choose, has given in his lifetime, to one of his children, the things which were subject to the fiduciary trust, this donation would be in the place of an election if the same were not revoked. For although the liberty of this choice ought to last until the time of the death of the person charged with the fiduciary substitution, and it was for the interests of all the children that the said donation should not destroy the said liberty, yet it would be sufficient that the donee had been made choice of, and that the said choice had not been revoked; seeing the choice would be confirmed by the will of him who, having it in his power to make another choice, had not done so. So it would be the same thing as if the choice had been made at the time of his death."

The courts in Lower Canada are not bound by the current of decisions in England, as the judges in England before 1874, and Lord Alvanley in the case of *Kemp v. Kemp*, considered themselves to be bound in deciding whether a power was inclusive or non-exclusive. Even in England those decisions had caused so much inconvenience that it was found necessary resort to legislation upon the subject, and the law was amended by Act 37 & 38 Vict., c. 37.

A similar Act was not necessary in Lower Canada. The courts there were not trammelled by the current of authorities to which Lord Alvanley and other judges in England were forced to yield.

Judge Ramsay, in his written reasons says, and says with some force, speaking of the law of England before 1874, "It is only by the help of repeated legislation, that the law there has come down to that reason from which I apprehend our law starts. It was therefore quite unnecessary for us to make any Act similar to the English Act 37 & 38 Vict., c. 37."

Mr. Justice Ramsay also, in his reasons, states that, "Under the Roman law and under the old régime of France there was a great question as to the effect of the substitution of the children or of a class, as for instance the relations, and that at least it seems to have been determined that when the children of the *grevé* were called *nominatim* they held of the original testator, and that the father

EXCLUSION OF CHILDREN.

"could not effect the disposition; but that when the children were called collectively, there was a difference of opinion as to whether the father could select among the children so as to give to some and exclude others." He adds: "Although the affirmative of the proposition cannot be supported on a strictly legal argument, it seems to have prevailed." He then cites some authorities in support of his argument.

Their Lordships are not prepared to say that that exposition of the law is not correct. If then, a man to whom an estate is given for life, charged with a substitution in favour of his children after his death, can substitute one or more of his children to the exclusion of others, the addition of the words in the present case, "in such proportion as he shall decide," does not affect the nature or substance of the substitution. It only gives power to the father to do that which he could have done under the general words of the substitution in favour of his children.

It would be lamentable if their Lordships, in a case arising in Lower Canada and to be determined by the law of that country, should feel themselves bound by a course of English decisions which have been swept away by the Legislature as fraught with inconvenience and mischief, and thus be driven to such a construction of the will of William as would form a precedent in future cases of a similar nature, and thereby introduce in Lower Canada all those difficulties and inconveniences which it required the force of an Act of Parliament in England to remove. In their Lordships' opinion the decision of the Court of Queen's Bench is correct. They will therefore humbly advise Her Majesty to affirm the judgment of that Court.

DESTRUCTION OFWELCH V. PHILLIPS¹

41. When it is known that a man has made a will, and that after his death this will cannot be found after reasonable search, the law presumes that the testator has destroyed it.

MR. BARON PARKE, p. 302:—Now the rule of the law of evidence on this subject, as established by a course of decisions in the Ecclesiastical court, is this: that if a will, traced to the possession of the deceased, and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect, unless there is sufficient evidence to repeal it. It is a presumption founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved, by a person of ordinary caution, in some place of safety, and would not be either lost or stolen; and if, on the death of the maker, it is not found in his usual repositories, or else where he resides, it is in a high degree probable, that the deceased himself has purposely destroyed it. But this presumption, like all others of

¹ Canterbury, 1836 Dec. 13, 1 Moore 299.

DESTRUCTION OF

fact, may be rebutted by others which raise a higher degree of probability to the contrary.

The *onus* of proof of such circumstances, is undoubtedly on the party propounding the will.

CUTTO V. GILBERT ¹

42. Where a subsequent will, the contents of which being unknown, and having remained in the custody of the deceased is not forthcoming, the presumption of law is that it was destroyed by him *animo revocandi*, and does not revoke a prior will uncanceled.

FORM OF

MEIKLEJOHN V. ATTORNEY GENERAL AND CALDWELL ²

43. A testator made an holograph will written by himself, but not bearing his signature. There was no attestation clause by witnesses, and there was no date affixed to it. But proof of the date was sufficiently made, by special leave of their Lordships, before the Privy Council. This will having been set aside by all the courts in Canada as null and void, an appeal was taken to the Privy Council. The pretention of the appellant was that the will was valid according to the law of England, as it has long been established in the courts in England, that the signature by a testator of his name at the beginning of a will, as in the present case, was, for the purposes of the statute of frauds, as good as his subscription of it at the end, in the ordinary method.

The Privy Council confirmed the judgment of the courts below and held the will null.

SIR LANCELOT SHADWELL, VICE-CHANCELLOR, p. 334: — Their Lordships are of opinion, that upon the true construction of the Act 14 Geo. 3, c. 83, s. 10, a will disposing of lands or goods in Canada will be good if executed according to the law of Canada, which requires the same form for a will of lands as for a will of goods; and that a will disposing of goods in Canada will be good, if by the law of England it were sufficient to dispose of personal estate; but that a will disposing of lands in Canada, if it be not executed according to the law of Canada, will not be good unless it is made according to the law of England. The words of the section are, "executed either according to the laws of Canada or according to the forms prescribed by the laws of England." By the English law no form is required for making a will of personal estate, but the laws of England have prescribed certain forms for making valid wills disposing of freehold lands; and their Lordships are of opinion, that those forms are referred to by the statute when it speaks of a

¹ Canterbury, 1854 July 7, IX Moore 131.

² Lower Canada, 1834 June 21, II Knapp 328.

FORM OF

will of lands executed according to the forms prescribed by the laws of England, and that the term "executed" comprehends the making, subscribing and attesting, in the manner directed by the Statute of Frauds.¹

Their Lordships are also of opinion, that the Provincial Act of 41 Geo. 3, did not intend to alter, and has not altered, the law with regard to the form of making wills in Canada, but does, by the use of the words "devise or bequeath," and "whatsoever be the tenure of such lands," and by referring to a devise by will in mortmain, show that the Canadian legislature considered the Act of 14 Geo. 3 to refer to devises of land, technically so called in the law of England. It is plain, upon the cases and authorities which have been referred to, that the will in question, though holograph, and admitted to be final, was not signed according to the old law of France, which is the law of Canada, and requires that the signature shall follow the disposing part of the will; and as an English will of lands, it is clearly null.

CASTLE V. TORRE²

44. An holograph will, written in abbreviated words, and initial letters as to names, dated, and commencing: "Head of instructions to my solicitor J. Lee, to add to my will the codicil following," but concluding with the declaration, "this is my last will and testament," signed, and endorsed "Memmo. to J. Lee—Will," though dated more than four months previous to the decease of the testator, who met with a sudden and violent death, was admitted to probate; the Judicial Committee being of opinion, that although the paper *per se* did not amount to a codicil, the effect of the evidence was to show, that, considered as instructions, it was fixed and final, and contained the settled intentions of the deceased up to the last moments of his life, which were only prevented from being formally carried into execution by his sudden death. See EVIDENCE: *abandonment of will from lapse of time*.

SMEE V. BRYER³

45. The words "*signed at the foot or end thereof*" in the 9th section of the Statute of Wills, 1 Vict., ch. 26, are to be construed strictly.

¹ Since that time the English Parliament has introduced rules for making wills of personal estate, copyhold and leasehold property as well as freehold property. The Commissioners for the codification of our laws have adopted these rules, because, said the Commissioners, (5th reports of the Commissioners, art. 105a, page 177), "this modification will be found to be more in harmony with the notions which have been acquired from habit and reading by persons of English extraction; it is moreover an approximation to our own law." These changes may be found between brackets at articles 851 *et seq.* of the Civil Code of Lower Canada.

² Canterbury, 1837 Dec. 16, 11 Moore 133.

³ Canterbury, 1848 July 17, VI Moore 404.

FORM OF

An holograph will was written on a sheet of foolscap paper, the dispositive part of which ended on the third side, leaving, at the foot or end of the third side, a space sufficient to have received the signature of the deceased, and also that of the two attesting witnesses, but the attestation clause was written in the middle of the fourth side, no part of the will being immediately above it. The Judicial Committee held, that the will was not signed "*at the foot or end*" according to the requirements of the Statute, and the will was declared invalid.

CASEMENT V FULTON ¹

46. Under the Indian Wills Act, both witnesses must be jointly present at the signature of the will by themselves in their quality. The acknowledgement of their signature, in the presence of the testator by each other, does not comply with the requirements of the Act, which says that the testator shall acknowledge his signature "in the presence" of two or more witnesses, present at the same time, and "such witnesses shall subscribe the will in the presence" of the testator."

ALLEN V. MADDOCK ²

47. When there is a reference in a duly executed will to another testamentary instrument, by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and when the parol evidence sufficiently proves that in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified.

48. An unattested paper, which would have been incorporated in an attested will or codicil, executed according to the Statute of frauds, is now in the same manner incorporated, if the will or codicil is executed according to the requirements of the Wills Act, 1 Viet., ch. 26, sec. 9.

THE RIGHT HON. T. PEMBERTON LEIGH; p. 439:—Before the "Act for the amendment of the laws with respect to Wills" 7 Will. IV, and 1 Viet., ch 26, was passed in the year 1837, no formalities of any kind being necessary in the execution of a Will or Codicil as to personal estate, the effect of a well executed testamentary instrument upon one not well executed could hardly come before a Court of Probate. But such questions arose very frequently in the temporal Courts, with respect to the disposition of real estate; and the statute alluded to having placed wills, as to real and personal pro-

¹ Calcutta, 1849 June 19, V Moore 130.

² Canterbury, 1858 Feb. 19. XI Moore 427.

FORM OF

erty, on the same footing, it should seem that the authorities upon this point with respect to real estate, whether before or since the statute, in the courts of law, are now equally applicable to the court of Probate, with regard to personalty. In considering them, however, it is necessary to bear in mind this distinction between cases before the statute, and subsequent cases, namely, that, before the statute, a testamentary paper not executed so as to affect real estate was valid as to personalty; was really a will or codicil, and might, therefore, strictly answer that description in a subsequent reference to it by that name; whereas since the statute came into operation, no paper not properly executed and attested can, in strictness, be for any purpose a will or codicil

It is necessary also to remember the distinction between the admissibility of evidence to prove a testamentary paper, and of evidence to explain its meaning, that direct evidence of intention, declarations of the testator by word, or in writing, and other testimony of a similar character, are admissible, when the will is disputed, but that no such evidence can be received in order to explain the expressions which he has used. Still, in construing his will, the Court is entitled, and is bound, to place itself in the situation of the testator with respect to his property, the objects of his bounty, and every other circumstance material to the construction of the will, and for this purpose to receive, if occasion require it, parol evidence of those circumstances, and to expound his meaning with reference to them.

P. 443 : — Supposing the paper propounded as a will in this case had been executed a few hours before the codicil, and that there was positive proof that the testatrix signed no other paper till she signed the codicil, the objection which is now made would, in law, be precisely of the same force.

It has not been disputed that, if the codicil, had identified the paper, by describing it as containing certain bequests, such reference would have been sufficient to let in the proof, yet in such case the proof would equally depend on the assumption that there was no later will which contained similar bequests.

No doubt the rule of law is as stated by Lord Eldon in *Smart v. Prujean*, (6 Ves. 565), that "an instrument, properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is which is meant to be incorporated." For this purpose it is necessary that it should be so described as to leave no doubt in the mind of the judge, in the circumstances as they actually existed and are proved before him, that the paper referred to is the paper propounded.....

In the case of *Smart v. Prujean*, the Testator by his will directed the proceeds of his real estate to be applied to such purposes as he should, by a private letter, which he stated in his will that he intended to leave with the Abbess of a Convent named, or her successor, appoint. This will, according to the statement of it in the report, does not seem necessarily to have referred to any particular paper then in existence. The letter which he declared his intention to leave might be either one which he had already written

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or one which he intended to write. In point of fact the testator never deposited any letter in the custody mentioned in his will, but at his death two papers were found in an envelope, which inclosed also his will, one being a letter addressed to his executors, and another a letter addressed to the Abbess in question, both documents bearing date some months before his will, and one of them mentioning that he had devised his worldly estate and effects to trustees upon the uses mentioned in the letter. The letter, therefore, in terms, referred to a will already made, and could hardly be construed to refer to the will actually produced, which was dated many months afterwards. Nor had the letter been delivered over to the Abbess, which Lord *Eldon* thought, by the terms of the will, was an essential part of the condition to give it validity. He, therefore, very naturally asked, if other letters had been proved, how could these be distinguished from them? He did not on that occasion express any doubt that parol evidence might be received, provided the reference in the will was to a paper already existing and sufficiently identified.

In a subsequent case, however, if Lord *Eldon's* observations are accurately reported, he appears to have intimated some doubt whether a paper antecedently existing, and clearly and undeniably referred to, could be made part of the will, *Wilkinson v. Adam* (1 Ves. & Bea. 445); but, if any such doubt was ever thrown out, later decisions removed it, and completely established the rule that, before the late Wills Act, a paper distinctly referred to by a will might be incorporated in it.

A reference by a testator to his last will, is a reference in its own nature to one instrument, to the exclusion of all others; if so, the description identifies the instrument. It is not like a general reference to codicils, of which there may be several.

In the numerous cases to be found on the subject of republication of a will by a codicil duly executed, and which, in effect, is equivalent to a re-execution of the former instrument, it has never been held necessary that the codicil should refer to the particular paper containing the will, so as to distinguish it from all other wills.

In *Barnes v. Crowe* (1 Ves. J. 497), Lord Commissioner *Eyre* observes: — "The testator's acknowledgment of his former will, considered as his will at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; as, by the nature of it, it supposes a former will, refers to it, and becomes part of it; and, being attested by three witnesses, his implied declaration and acknowledgement seem also to be attested by three." It was decided in that case, that the republication of a will by a codicil was not only a recognition of the will, but had the effect of a re-execution, so as to make it speak as from the date of the codicil, and to give a different meaning to a general devise of lands from that which it previously had.

To this doctrine Sir *William Grant*, though he felt himself obliged to yield to authority, was much opposed, and when he had to consider the case of *Barnes v. Crowe*, in the case of *Pigott v. Waller* (7 Ves. 118), he urged very strong reasons against the principle of

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that decision; but that a codicil to a will, though not referring to it, recognizes a preceding will, and amounts to a republication he does not intimate any doubt. His words are—"A direct republication, or re-execution, is an unequivocal act, making the will operate precisely as if it was executed on the day of the republication. But a reference to the will proves only, that the deviser recognizes the existence of the will; which the act of making a codicil necessarily implies; not that he means to give it any new operation, or do more by speaking of it than he had already done by executing it." He afterwards observes, p. 120—"The Lords Commissioners, in *Barnes v. Crowe* appear to have determined "that every codicil, duly attested, ought to be held a republication. Their opinion seems to be, that the codicil was incorporated with the will. The general proposition referred to by Lord Commissioner *Eyre*, is, that the execution of a codicil should in all cases be an implied republication."

In the case of *Doe d. Williams v. Evans* (1 Cramp. & Mees. 42), a testator prepared a will which he did not sign, and about a fortnight afterwards duly executed a codicil on the same sheet of paper, commencing with these words: "codicil.—I, *David Evans*, make a codicil to the foregoing will;" and it was held that the codicil operated to incorporate and establish the will. Mr. Baron *Bayley* in giving judgment, observes, "The will was written on part of a sheet of foolscap paper, and the codicil was written on the same sheet. Now, if the codicil had not referred to the will, I should have thought that it did not set up that instrument; but if the codicil do refer to the will, then I am of opinion that it does set it up. The language is, 'codicil—I, *David Evans*, make a codicil,' which word implies an addition to a former instrument. It proceeds, a codicil to the foregoing will;" and the learned judge then observes, "The testator, by executing this codicil, appears to me, at that time, in as plain terms as possible, to have set up, not only the codicil, but the will."

In this case there was a distinct reference to the particular paper referred to in such a manner as to exclude all doubts of the instrument intended; but in the case of *Guest v. Willasey* (2 Bingh. 429, S. C. 3 Bingh. 614), this circumstance was wanting. A testator there made his will, duly attested. On the back of this will he wrote three codicils, two unattested, and the last attested. The last codicil revoked the appointment of an executor made by the second codicil, but did not otherwise refer either to the will or codicil. The Court was of opinion that the last codicil operated as a republication, not only of the will and of the second codicil, but also of the first.

It is true that in both these cases the several writings were all upon the same sheet of paper, but when the difficulty arises from an absence of the ceremonies required by the Statute of Frauds, this circumstance does not seem of much importance. It may greatly facilitate the identification—it may make the evidence more conclusive, but it can hardly make it more admissible.

Accordingly, it does not seem to have been thought necessary in subsequent cases.

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In the case of *Gordon v. Lord Reay* (5 Sim. 274), a testator made his will, dated the 17th of August, 1812, duly executed and attested, by which he devised £10,000 to the Plaintiff, charged on certain estates. He afterwards made a codicil, unattested, dated the 8th of April, 1814, by which, after reciting that he had sold the estates so charged, he directed that the legacies should be paid out of and charged on his other real estates. On the 13th of August, 1818, he made a second codicil, duly executed and attested, by which he confirmed the provisions made by his will of the 17th of August, 1812, in favour of the Plaintiff, but took no notice of the codicil of the 8th of April, 1814; yet it was held, that a codicil being in law a part of a will, the second codicil, by confirming the will, established the first codicil so as to charge the £10,000 legacy on the real estates.

That case was decided in 1832. In the subsequent case of *Utterton v. Robins* (1 Ad. & Ell. 423), which was argued before the Court of King's Bench on a case sent from the Court of Chancery in 1834, a question of the same kind arose. In that case the testator made a will, dated the 12th of September, 1823, duly executed and attested, and after devising a house in *Brompton Terrace* to his daughter, Mrs. *Utterton*, gave the residue of his real and personal estate to trustees. By a memorandum in pencil in the margin of his will, dated the 6th of August, 1825, signed, but not attested, the testator recited that he had sold the house given by the will to his daughter, and gave her instead of it a house in *Portugal Street*. He afterwards signed another unattested codicil, dated the 29th of August, 1825, to the same effect, and afterwards made several codicils properly executed and attested, for the purpose of including in the operation of his will, after purchased estates. The last of these codicils was dated the 5th of February, 1830, and was in these words: "I, *John Robins*, do make this further codicil to my will, which bears date the 12th day of September, 1823. I give and devise all real estates and hereditaments purchased by me since the date and execution of my said will, to the trustees therein named, their heirs and assigns, to the uses and upon the trusts in my said will expressed and declared of and concerning the residue of my real estates."

The house in *Portugal Street* had been purchased between the date of the will and of the codicil of the 29th of August, 1825, and the question for the consideration of the Court was, to whom the house in *Portugal Street* passed; it being contended on the part of Mrs. *Utterton*, that the last codicil, though not referring to any instrument but the will, operated as a republication of all the codicils, whether attested or unattested, and that the house in *Portugal Street* passed to Mrs. *Utterton*. The case of *Gordon v. Lord Reay* was not cited, and the Court did not decide whether such codicil would or would not establish the unattested codicils not referred to; though Mr. Baron *Parke* may be considered to have intimated an opinion against giving to the codicil what he terms "that immense effect in republication which Mrs. *Utterton's* Counsel ascribe to it;" but the Court held, that supposing the codicils in favour of Mrs. *Utterton* to have been duly attested, the last codicil would have revoked them, and devised the estate in question to the

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trustees under the will. The learned Judges had no doubt that any testamentary paper unattested, sufficiently referred to a duly executed and attested codicil, would be established by such codicil, though the two instruments were not only not on the same paper, but were not even in the same country.

This is the result which we collect from the observations which fell from the judges in the course of the argument, though they contented themselves with sending a certificate of their opinion to the Court of Chancery as to the effect of the devise, without assigning any reasons.

In the case of *Radburn v. Jervis* (3 Beav. 450), decided by Lord Langdale; the cases of *Guest v. Willasey*, *Gordon v. Lord Reay*, and *Utterton v. Robins*, were all cited; and his Lordship was of opinion, that a codicil duly executed and attested, though referring only to the will, operated to establish and republish all previous codicils, whether duly executed or not.

The testator there made a will giving various legacies, and charging his real estates with all legacies thereby given. He made many codicils, some duly executed and attested, and some not; and by one of the latter class he gave a legacy to Mr. Brundrett. His eleventh codicil was duly executed and attested, and began in these words: "This is a further codicil to the last will and testament of me, Sir Thomas Clarges, Bart., made this 10th day April, 1828." The codicil was confined to revoking the appointment of two gentlemen named in the will as trustees, and the legacies given to them, and to appointing Brundrett an executor and trustee in their stead. Lord Langdale held, that the legacy to Brundrett was not charged on the real estates, because the codicil did not so charge it, and the will charged only the legacies thereby given; but he was clearly of opinion, that the last codicil operated as a republication of all the preceding codicils, as well as of the will, though none of the codicils were referred to. His language is—"The object of the last codicil, which was duly executed and attested, was to revoke the appointment of trustees and executors named in the will, and the bequests given to these trustees, and to appoint Mr. Brundrett to be executor and trustee; and though, in effect, it operated as a republication of the will and former codicils, and might have extended any prior general devise to lands subsequently acquired before the date of the last codicil, and have subjected such subsequently acquired lands to a general charge contained in the will; yet, considering it as a republication of the will and all the preceding codicils, I do not think the effect is to charge on the land, legacies which by those codicils were not so charged."

Aaron v. Aaron (3 De Gex & Sm. 475), before Lord Justice Knight Bruce, recognizes the rule of law as established in *Gordon v. Lord Reay*, and treats it as not inconsistent with the decision in *Utterton v. Robins*; and his Lordship observes "that it can make no difference whether the codicil be written on the same paper with the will, or written at a subsequent period, or not."

The cases to which we have referred all turned upon instruments anterior to the late Wills Act; but they show that before that Act,

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in order to give validity against real estate to a testamentary instrument previously ineffectual for the purpose, such a general reference was sufficient as, when compared with the evidence produced, would enable the Court to identify the document; that a codicil would operate as a republication of the will, and that a republication of a will would amount to a republication of whatever antecedent papers might answer the description of codicils, leaving it to be ascertained by parol evidence what might be the particular papers answering the description of either will or codicil.

This doctrine was very much discussed in the case of *Hitchings v. Wood*, before the Judicial Committee in 1841, reported in 2 Moore's P. C. Cases, 355; and many valuable observations bearing upon this question were made by Lord *Lyndhurst*, though, as the case arose before the Wills Act of 1837, and related only to personal estate, it has not the authority of a decision on the point in controversy.

As to the certainty of the reference required by the law in the incorporating instrument, there does not seem to be much distinction, under the Statute of Frauds, between a will and any other instrument. In either case it is necessary, and it is sufficient, that the description should be such as to enable the Court, when the evidence is produced, to say what is the instrument intended.

Supposing the evidence to be admissible as the case would have stood under the Statute of Frauds, has the Wills Act of 1837, altered the general law upon the subject? There are no words in the Act by which any such intention is declared. It has altered the mode in which the instrument containing the will is to be executed, but it has left untouched, as it appears to us, the question what papers are to be held included in the instrument so executed. The Statute of Frauds enacted, that all devisees of lands shall be in writing, and signed by the deviser, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in his presence by three or four credible witnesses, or else they shall be void.

The Wills Act, 7th Will. IV., and 1 Vict., sec. 9, provides, that no will shall be valid unless it be in writing, and signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

The ceremonies necessary to authenticate the instrument are altered, but no alteration is here made in the effect to be given to words used in it. It should seem that a paper which would have been incorporated in a will executed according to the Statute of Frauds must now be incorporated in a will executed according to the new Act.

In those instances in which the Legislature was of opinion that the construction put by decided cases upon the Statute of Frauds, as to the execution of wills, or the rules applied to devisees contained in them, required alteration, provisions for that purpose were introduced into the Act.

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The incorporation of unattested documents by reference in an attested will, was a subject of very great importance, and had excited much attention, the propriety of which had been sometimes doubted, at least to the extent to which it had been carried. It can hardly be supposed that if it had been intended to introduce so great an alteration in the law, it would not have been introduced by express declaration. But to have introduced any such declaration would have occasioned, in many cases, great inconvenience and injustice.

EVANTUREL V. EVANTUREL¹

49. A testatrix, domiciled in Lower Canada, who was unable to write, sent for a notary to make her will, giving him directions as to the dispositions it was to contain, which he took down in writing. The notary, in conformity with the instructions prepared the will and handed it over to her. The testatrix afterwards consulted a counsel on the subject of the will and he made an alteration in the margin. Two days afterwards the testatrix went to the notary's office bringing with her the will which he perused, and seeing the alterations, drew his pen through them. He then sent for another notary and in the presence of the second notary asked her, what were the dispositions she desired to make, which she expressed briefly to be all the dispositions contained in the will. The first notary then read over the will to her, and she suggested certain alterations, which were made by him in the presence of the other notary, and in his presence he re-read to the testatrix the additions and corrections made. As the testatrix could not write, the "*énoncé sacramentel*" was as follows:— "*A déclaré ne savoir ni écrire ni signer, de ce requis, lecture faite et refaite.*"

The Judicial Committee held, that the execution of the will was good, and the requirements of the 289th article of the *Coutume de Paris*, had been sufficiently complied with, as the words "*dicté et nommé par le testateur aux dits notaires*" did not require, in express terms, that the will should be written by a notary at the time of dictation by the testatrix.

SIR ROBERT PHILLIMORE, p. 107:—It may be convenient here to dispose of the two "*moyens de faux*" which relate respectively to the date of the testament and to the alterations in a strange hand. It has scarcely been contended before this court that this testament was "*dicté et nommé*" on the 16th of May; and such a contention, in their Lordships' opinion, cannot be sustained. The question of the execution of the testament must be confined to the date of the 18th of May. With respect to the alterations in a strange hand, they are

¹ Lower Canada, 1869 March 15, VI Moore N. S. 75.

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fully accounted for by the testimony of the witnesses and can in no way affect the decision in this case.

In the evidence given by the witnesses, MM. Petitelere, Casault, and Huot, some discrepancies occur, and also in the two depositions of M. Petitelere made at different times; but their Lordships entirely concur with the remarks of Mr. Justice Taschereau upon this subject, and are of opinion with him that these discrepancies are insignificant and do not affect the real and only question in this case, namely, the true construction of the law which governs the execution of this testament.

There is no controversy as to what that law is. It is the 289th Article of the "*Coutume de Paris*," as declared by the Parliament of Paris in 1580, and it is in these words:

ART. 289.—"Pour réputer un testament solennel, il est nécessaire qu'il soit écrit et signé du testateur: ou qu'il soit passé pardevant deux notaires, ou pardevant le curé de la paroisse du testateur, ou son vicaire-général et un notaire; ou du dit curé ou vicaire et trois témoins; ou d'un notaire et deux témoins: iceux témoins, idoines, suffisants, mâles et âgés de vingt ans accomplis, et non légataires, et qu'il ait été dicté et nommé par le testateur aux dits notaires, curé ou vicaire-général, et depuis à lui relu en présence d'iceux notaires, curé ou vicaire-général, et témoins, et qu'il soit fait mention au dit testament qu'il a été ainsi dicté, nommé et relu; et qu'il soit signé par le dit testateur et par les témoins: ou que mention soit faite de la cause pour laquelle ils n'ont pu signer."

It is contended by the appellants that the provisions of this regulation have not been complied with, and that the testament is therefore invalid. They maintain that, according to the true construction of that regulation, and especially of the words "dicté et nommé par le testateur aux dits notaires," the testator must declare the dispositions which he desires to make, and that one notary at least, if not the two, must then and there write down these dispositions, and that unless this requisition of the law be obeyed, the testament is null.

This construction of the *Coutume* was adopted by Mr. Justice Taschereau in the Superior Court of Lower Canada; and, accordingly, he sustained the "*inscription en faux*," and pronounced against the validity of the testament. From this sentence an appeal was prosecuted to the court of Queen's Bench of Lower Canada. That court reversed this decision, holding that the testament was duly executed. The court was composed of five judges; of these, three, Chief Justice Duval, Mr. Justice Aylwin, and Mr. Justice Meredith delivered their judgments in favour of the validity of the testament; while two, Mr. Justice Drummond and Mr. Justice Mondelet, dissented, and agreed with Mr. Justice Taschereau. From this sentence the present appeal has been prosecuted.

The case has been fully argued before their Lordships, and we have now to deliver our opinion upon the true construction of the 289th Article of the "*Coutume de Paris*" in its application to the testament which is the subject of this litigation.

Some preliminary observations occur which it will be well to mention in this place. First, that the language of this "*Coutume*"

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does not require in express terms that the will should be written by a notary at the time of dictation; though it does require that the will should be read over in the presence of the notaries and of the testator; and secondly, that there is no declaration like that which is to be found in the Code Napoléon, that the formalities enjoined shall be observed on pain of nullity.

In respect to these particular words "*dicté et nommé*," it appears to their Lordships that they must be considered as conveying one idea, the latter word being only used to strengthen the former; and in this opinion their Lordships are justified by the opinion of the learned editor of "*Ferrière*," and of the decision to which he refers:

"La première chose à observer est qu'il faut que le testament soit dicté et nommé par le testateur, sur quoy on a demandé autrefois, si des mots équivalants suffisoient, comme *proferez de sa propre bouche*, il a été décidé qu'ils ne suffisoient pas, la "*Coutume*" disant dicté et nommé; mais que si un notaire ne mettoit que l'un des deux, ou dicté ou nommé, comme ils sont synonymes, qu'il n'y auroit point de nullité."—(Vol. iv., page 133.)

It was admitted by the counsel for the appellants that it was not necessary that the notary should write "*môt à mô*" the dispositions of the testament as dictated by the testatrix, that he might put them in proper language and in proper order, and with whatever amplifications were necessary to give them due legal force and effect, and that the testatrix might dictate from a written and previously prepared instrument. And their Lordships are clear that this view is correct, having regard both to the reason of the thing, and to the decisions which have been given upon the particular *Coutume*, as well as those which have been delivered upon the far more rigorous language of the Article in the Code Napoléon, which are collected in Dalloz, vol. xvi, tit. 4, chap. 2, section 4, article 2. [De l'écriture par le notaire.]

In forming our judgment upon the general construction of the *Coutume*, one of the primary considerations has necessarily been to ascertain what was the *mischief* which this law was framed to remedy, and upon this point there is really no room for doubt.

The authority of the commentator Claude de Ferrière has been much relied upon by both parties, and it is entitled to considerable weight in the explication of this law. After mentioning the various ways in which a *testament solennel* may be made under this *Coutume*, he adds: "Notre Coutume outre cela requiert dans les testaments plusieurs solennitez, pour empêcher les fraudes et les suggestions. La première formalité est, qu'il ait été dicté et nommé par le testateur à celui qui l'a reçu. La deuxième, qu'il soit relû au testateur, et qu'il soit fait mention, qu'il a été dicté, et nommé, et relû. La troisième, qu'il soit signé par le testateur et par les témoins." (Ferrière "*Coutume de Paris*," vol. iv, p. 18, ed. 1714.) And again, the same author, speaking of a will made *ad interrogationem alterius*, says: "La validité d'un testament ainsi fait, dépend beaucoup des circonstances, car les formalités ne sont pas requises dans les testaments pour empêcher de tester, mais pour empêcher qu'ils ne fussent contre la volonté et l'intention des hommes; ainsi s'il paraît par les

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circonstances, que la disposition faite *ad interrogationem alterius* a été l'esprit de celui qui l'a faite, elle doit être confirmée; aussi cela dépend de la prudence des juges."—(pp. 105, 106.)

This mischief of a fraudulent, or false, or extorted or even suggested disposition, instead of the genuine expression of the testator's wishes, is certainly not incurred where, as in this instance, the testator is asked what his wishes are, where he deliberately expresses them, and where the instrument which contains them, though previously written, is read over to and approved by him. Their Lordships agree with the opinion of Mr. Justice Taschereau on this point: "Il y a peu de doute que dans le cas présent, le testament argué de faux en cette cause présenterait à mon esprit une idée très forte de l'expression vraie et complète des volontés de Madame Evanturel."

The execution of this testament not having sinned against the mischief which the law was intended to prevent, the consideration next in order appears to be, what interpretation did this law receive from contemporaneous exposition?

This exposition is derived from the "*arrêts*," or judicial decisions on the question, and is evidenced by the usage and practice of Notaries Public.

In considering the various *arrêts* cited both in the courts below and at the Bar before us, we must distinguish those in which the testament was merely acknowledged in the presence of two notaries, though twice read in their presence and approved by the testator, from the present case, in which there was an actual dictation by the testatrix of the whole of her testamentary dispositions, though the writing did not follow that dictation. Even with respect to *arrêts* of the former description, there are three reported by Ferrière: that of Machéco, in 1597; that of Pisany, in 1682; and that of Claude Pollaët, 1616, which latter *arrêt* was also confirmed by the Appellate Court; in which the testaments acknowledged and in the last case also signed by the testator in the presence of two notaries, but not dictated, were pronounced to be valid. It will be borne in mind that the date of the declaration of the *Coutume* is 1580; these *arrêts*, therefore, so far as their authority extends, have the force of a contemporaneous exposition.

There are, it is true, on the other hand, various *arrêts* to be found in the books, in which testaments acknowledged and approved by the testator in the presence of two notaries, and twice read over, have been pronounced null, on the ground of their not having been "*dictés et nommés*," according to the *Coutume*; but there does not appear to be one in which a testament "*dicté*" as this testament was, has been set aside on the ground, either that the dictation was insufficient, or that the writing ought to have followed the dictation. And lastly, upon this point it is to be observed, that in the cases of *Robitaille v. Bonneville*, and *Routier v. Robitaille*, decided by the court of Queen's Bench for the district of Quebec by Chief Justice Sewell and Mr. Justice Kerr in the year 1829, in which cases the testament was "*inscrit en faux*" on the ground that it was not legally executed as a "*testament solennel*," that is, not "*dicté et*

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nommé" according to the law and as certified by the notary, Mr. Justice Meredith says; and no doubt with perfect accuracy:

"The evidence adduced in that case has been placed before us, and from the depositions of the two notaries and other evidence, it appears that the second notary was not present when the will was written. And yet the will was held to be a good will.

"The case went to appeal, and was disposed of, as the gentlemen of the bar are aware, upon a different ground, and all that is said in the report respecting the point now under consideration is:

"The court below, however, considered that the will had been regularly made, and rejected the "*inscription en faux*."

There is no doubt that jurists, both in Canada and in France, have differed upon the construction of this article of the *Coutume*. Their discordant opinions are more or less reflected by the conflicting decisions above referred to, and also by the difference in the practice of notaries in Canada. The interpretation put by the usage of the officers who perform a public duty in the preparation of wills, is by no means unimportant; and the result of the evidence upon this head is, that the practice of the leading notaries in the principal Canadian towns of Montreal and Quebec greatly preponderates in favour of the mode of executing a testament adopted in the case before us.

It appears therefore to their Lordships that, even if the French authorities were admitted to be in favour of the stricter construction of the article in question, the latter interpretation has, both by decision and by long usage, acquired the force of law in Lower Canada.

The 23rd article of the Ordonnance des Testaments of 1735, and the 972nd article of the Code Napoléon have been referred to, and the decisions with respect to them were considered by the judges of the court below, whose opinions were adverse to the validity of this testament. Their Lordships do not think it necessary or expedient to enter into an examination of these decisions. There is, however, an observation arising from the consideration of these two later acts of French legislation which is, perhaps, not irrelevant to the question before us. The Ordonnance requires that the notaries, or one of them "*écriront les dernières volontés du testateur telles qu'il les dictera*." And the article of the Code Napoléon, that the testament "*doit être écrit par l'un des notaires tel qu'il est dicté*;" and a subsequent article provides that the prescribed formalities shall be observed *under pain of nullity*. The inference from the insertion of these additional formalities and of the penalty by which they are guarded in this latter legislation, is certainly not unfavourable to the *liberal construction* of the *Coutume* declared in 1850, under the authority of which the testament before us was made.

After a careful consideration of the law, and of the authorities applicable to this case, inasmuch as it appears to their Lordships, that the mode in which this testament has been executed is not obnoxious to the mischief which the *Coutume* intended to guard against, the testament being the expression of the undoubted wishes of the testatrix, and inasmuch as the force of contemporaneous exposition embodied and continued in the practice of notaries down to the present

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time is in favour of the validity of such an execution—an exposition in itself reasonable and sound—and having regard to the principle of the comparatively recent decisions of the Canadian courts in *Robitaille v. Bonneville*; their Lordships will humbly advise Her Majesty that the judgments appealed from ought to be affirmed, the validity of this testament pronounced for, and the costs of this appeal paid by the appellants.

MIGNEAULT V. MALO¹

50. A testamentary paper unfinished and unexecuted, but proved to contain the testator's intentions, will be held valid, if it be shown satisfactorily that the fact of its not being completed was due to some cause other than the testator's abandonment of his intentions, as, for instance, his sudden death while the paper was being written from dictation, and such paper may be proved by parol evidence to be the last will of the deceased.

51. A will intended to be made by the testator under a form recognized by law, but null for want of formalities, may be good under another form.

SIR ROBERT PHILLIMORE, p. 370:—It remains to consider the second branch of contention. It has been argued on behalf of the appellants,—

(1.) That though the deceased intended to make a will in solemn form according to the French law, yet, if he did in fact make one, bad according to that, but good according to the English law, it is valid.

Their Lordships have no doubt that this proposition is true.

(2.) It has been argued that, if the judge was wrong in granting probate of both the papers, at all events, the unfinished paper written by the notary from the instructions of the deceased, was a valid instrument according to the law of England before the last Wills Act, and that they, the appellants, are content to have probate of that paper alone.

Their Lordships are, therefore, relieved from the necessity of considering whether a nuncupative form of will was valid in Canada at the date of Prudent Malo's death, and before the recent Code came into operation; as to which, however, they desire not to be considered as expressing any doubt whatever, or whether a probate could be properly granted of a nuncupative will and unfinished instructions as together containing the will of the deceased.

The question before their Lordships is reduced within these limits. Is the paper of unfinished instructions such a document as would have been entitled to probate under the law in force in England before the present Wills Act? For if so it was before the promulgation of the Code, which appears to have adopted the Wills Act, a good will in Canada under the provisions of the Quebec Act. Upon this point their Lordships entertain no doubt.

¹ Lower Canada, 1872 Jan. 15, VIII Moore N. S. 347.

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The law is very clearly laid down by a most experienced judge, Sir John Nicholl:—¹

"The legal principles," he says, "as to imperfect testamentary papers, of every description, vary much according to the stage of maturity at which those papers have arrived. The presumption of law, indeed, is against every testamentary paper not actually executed by the testator, and so executed as it is to be inferred on the face of the paper, that the testator meant to execute it. But if the paper be complete in all other respects, that presumption is slight and feeble, and one comparatively easily repelled. For intentions, *sub modo* at least, need not be proved in the case; that is, the court will presume the testator's intentions to be as expressed in such a paper, on its being satisfactorily shown that its not being executed may be justly ascribed to some other cause and not to any abandonment of those intentions so expressed, on his, the testator's part. But where a paper is unfinished, as well as unexecuted (especially where it is just begun, and contains only a few clauses or bequests), not only must its being unfinished and unexecuted be accounted for as above; but it must also be proved (for the court will not presume it) to express the testator's intentions, in order to repel the legal presumption against its validity. It must be clearly made to appear, upon a just view of all the facts and circumstances of the case, that the deceased had come to a final resolution in respect to it, as far as it goes; so that by establishing it, even in such its imperfect state, the court will give effect to, and not thwart or defeat, the testator's real wishes and intentions in respect to the property which it purports to bequeath, in order to entitle such a paper to probate, in any case, in my judgment."

"If the instrument² is (as it clearly is), in legal construction, one in progress merely and unfinished as to the body of the instrument, the legal presumption surely is that, had the deceased not been prevented from finishing it, he would have gone on to provide for his children in a subsequent part of the instrument. I cannot assent to the proposition contended for by one of the counsel, that if a testator dies while the instrument is in progress, that instrument, 'so far as it goes,' be its contents and effect what they may, must be valid. I know of no principle to that broad extent ever laid down; nor was any authority cited in support of it. The rule which I take to operate in the case of every unfinished paper is this: can the court infer that, by pronouncing for it, it will carry into effect what it collects, from all the circumstances of the case, to have been the deceased's wish? In that event it will be its duty to pronounce for it, but surely not if it sees reason to believe that, by so doing, it will defeat, or counteract, instead of giving effect to that wish."

In another case the same learned judge said:—³

"The facts are satisfactorily established. I have no doubt in pronouncing this to be the will of the deceased, as far as to the appoint-

¹ Montefiore v. Montefiore, 2 Addams, p. 357.

² Montefiore v. Montefiore, 2 Addams, pp. 359-60.

³ Kooystea v. Buyskes, and others, 3 Phillimore, pp. 530-31.

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ment of the executor; but it is perfectly clear that the other part was not committed to writing during the life of the deceased. Although the court goes the utmost length to give effect to intention clearly proved and reduced into writing in the lifetime of the testator, yet it has never held that anything added to a will after death can be established. Death consummates the instrument; nothing can be added afterwards.

"The last clause must be pronounced against and struck out of the will.

"I have no doubt of pronouncing for the will without it."

It was suggested that these decisions, which were made in 1820-21, were judicial developments of the doctrine as to imperfect testamentary papers, and were not intended to be incorporated into the Canadian law by the Statute of 1801. But unfortunately for this argument, various decisions of Sir G. Lee, a most learned ecclesiastical judge, in 1757, fully establish the doctrine which Sir John Nicholl in 1820-21, did not in truth develope, but declared to be the acknowledged existing law.

There can be no doubt that in this case it did completely express the wishes of the testator, and therefore, tried by the principles laid down in these and other cases, the paper containing the instructions written out by the notary is entitled to probate.

It remains only to consider the objection that the evidence by which these instructions are proved to contain the testamentary intentions of the deceased is inadmissible according to the *lex fori*—that is, the Canadian French law; and for this position article 1233, sec. 7, was relied upon, which requires that there must be "a commencement of proof in writing" (*commencement de preuve par écrit*), in order to admit the oral testimony of witnesses. If it were necessary to consider whether in this case this condition as to the commencement in writing had been fulfilled their Lordships would be strongly inclined to hold that it had been fulfilled; but in truth the case is not one to which the doctrine of the *lex fori* prevailing as to the admission of evidence is applicable at all. The law which introduced into the colony the English law as to wills, must be considered as having introduced it with all its incidents, and therefore with the admissibility of oral evidence, without which, indeed, the new law would be nugatory and of no effect.

Their Lordships have therefore arrived at the conclusion that the sentence appealed from should be reversed, that the judgment of the Superior Court of Canada in favour of the appellant should be affirmed, and that the respondents should pay the costs of this appeal and those of the Court of Queen's Bench in Canada.

FALLE v GODFRAY¹

52. Where a will was held by the law of Jersey to be null and void by reason of incompetent attestation, a validly executed codicil was nevertheless held not to fall with

¹ Jersey, 1888 Dec. 1, L. R. XIV Appeal Cases 70.

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the will, although the residue disposed of by the codicil included all the legacies given by the will.

53. A witness to a will, incompetent by reason of relationship to a legatee, is a competent witness to a codicil under which the said legatee did not take, and in a suit to which the said legatee is not a party.

SIR RICHARD COUCH, p. 75 :—That rule is a logical consequence of the limited scope of a Roman codicillus, by which an heir could not be instituted or disinherited, but a fideicommiss could be imposed upon the testamentary heir or legatee; and it would still be followed where the Roman law respecting codicils prevails. The learned counsel for the respondent relied upon passages which he quoted from writers upon the law in the provinces of France where the Roman law prevailed. It did not in the duchy of Normandy, from which the laws of Jersey were derived.....

In the absence of authority, their Lordships have to determine whether it is reasonable that as an absolute rule of law, a codicil is dependant on the will, and if the will is void the codicil must fall with it. If a testator, by a codicil duly executed gives a specific legacy, having, in a previous will not duly executed given other legacies, it does not seem reasonable that his intention expressed in the codicil should not be given effect to because effect cannot be given to the intention expressed in the will. Domat, part. 2, book 4, tit. 1, sect 21, Stracham's translation, in his remarks on article 4, speaking of the rule of the Roman law, says. "We should be afraid to trespass against equity if we should lay it down as a general rule either that all codicils are valid when there is no instrument, or that they are null when there is a testament which is found to be null." Their Lordships consider it is a sound rule that when effect can be given to the intention of a testator it should be given; and in the absence of any authority that the rule in the Roman law had become part of the customary law of Jersey, they would rather adopt a rule of law which gives effect to the intention of the testator than one which defeats it.

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ABBOTT V. FRASER¹

54. A testator bequeathed his residuary estate to trustees in trust to establish a public institute to be composed of a museum, a library and gallery; and gave directions that as soon as the future institute to be created should have been constituted into a corporation with all the powers necessary, the said trustees should transfer to it the estate and effects intrusted to them.

The Judicial Committee held, that such legacy was legal. There is no restriction against the right to bequeath estates

¹ Quebec, 1874 Nov. 26, L. R. V. P. C. 96.

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to a corporation to be formed in the future, provided there are intermediate fiduciary legatees.

SIR MONTAGUE E. SMITH, p. 11 :—The general power of testamentary disposition is found in article 831 of the Code.

"Every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without distinction as to its origin or nature, either in favor of his consort or of one or more of his children, or of any other person capable of acquiring and possessing and without reserve, restriction, or limitation, saving the prohibitions, restrictions, and causes of nullity mentioned in this Code, and all dispositions and conditions contrary to public order or good morals."

The restriction mentioned in the Code relating to corporations is contained in article 828.

"Corporations and persons in mortmain can only receive by will such property as they may legally possess."

The capacity of persons to acquire by testamentary disposition is subsequently defined in a series of articles under the head : "Of the capacity to receive and give by will." (Title 2, ch. 3, sect. 1)

The Code appears to embody the legislation, having for its object the freedom of testamentary disposition, which was contained in the Quebec Act, 14 Geo. 3, c. 83, and the Provincial Statute 41 Geo. 3, c. 4. It was held by this tribunal in a late case (*King v. Tunstall et al.*) that the combined effect of these statutes was to abrogate the old law which prohibited gifts by will to adulterine children.

Art. 869 was also strongly relied on by the appellants, as being specially designed to meet such a bequest as the present. It is as follows :—

"A testator may name legatees, who shall be merely fiduciary or simply trustees for charitable or other lawful purposes within the limits permitted by law. He may also deliver over his property for the same objects to his testamentary executors, or effect such purposes by means of charges imposed upon his heirs or legatees."

It could not be denied that the establishment of a public museum, library and gallery, was in itself, and apart from the manner of its foundation, "a lawful purpose." But it was contended for the respondents that, as the disposition of the property in favor of the institution was ultimately to be carried into effect by means of a corporation to be thereafter created, the purpose to be thus carried into effect was not "within the limits permitted by the law."

It is to be observed that the testator does not attempt to create or found a corporation, but having devised his property to trustees to establish the institute, directs them to procure for that purpose legal incorporation by means of a charter or an Act of Parliament.

Now there is no express prohibition to be found in any article of the Code against such a testamentary disposition; although there are express provisions defining the restrictions and disabilities to which corporations are subject with regard to acquiring and holding immovable property.

Thus art. 836, already cited, which is found in the chapter on

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wills, allows corporations to receive by will only such property as they may legally possess.

Then under the head of "Disabilities of Corporations," is—

"Art. 366. The disabilities arising from the law are—

"1. Those which are imposed on each corporation by its title, or by any law applicable to the class to which such corporation belongs.

"2. Those comprised in the general laws of the country respecting mortmain and bodies corporate prohibiting them from acquiring immoveable property or property so reputed, without the permission of the Crown, except for certain purposes only, and to a fixed amount and value.

"3. Those which result from the same general laws imposing, for the alienation or hypothecation of immoveable property held in mortmain, or belonging to corporate bodies, particular formalities, not required by the common law."

The counsel for the respondents, however, did not rely on this part of the case upon the provisions of this Code; but insisted, and this was their main contention, that the second article of the King's Edict of 1743 was still in force, and rendered the whole devise null.

That article is as follows:—

"Défendons de faire aucunes dispositions par acte de dernière volonté pour fonder un nouvel établissement de la qualité de ceux qui sont mentionnés dans l'article précédent, ou au profit des personnes qui seraient chargées de former le dit établissement, le tout à peine de nullité; ce qui sera observé quand même la disposition serait faite à la charge d'obtenir nos lettres patentes."

The establishments mentioned in the preceding article are—

"Aucune fondation ou nouvel établissement de maisons ou communautés religieuses, hôpitaux, hospices, congrégations, confréries, collèges ou autres corps ou communautés ecclésiastiques ou laïques."

It was contended that, notwithstanding the statutes relating to wills already referred to and the Code, this edict was still the governing law upon the subjects to which it relates, and in support of this contention, some decisions in the Canadian courts, and the case of *Chaudière Gold Mining Co. v. Desbarats and others*¹, recently before this tribunal were referred to.

The question in these cases, however, turned upon the capacity of existing corporations to acquire and hold immoveable property without the license of the Crown. Art. 10 of the edict prohibited such acquisition without the express permission of the king, signified in a particular manner, viz, by his letters patent registered in his *Conseils Supérieurs* of the province. But in their Lordships' view it is not necessary to resort to this article of the edict for the law on the point decided in the cases referred to. Art. 366 of the Code contains in itself a distinct rule on the subject. It no doubt refers to "the general law of the country respecting mortmain and bodies corporate;" but it at the same time interprets that law by the following words: "Prohibiting them from acquiring immoveable property, or property so reputed, without the permission of the Crown." This

¹ Law Rep. 5 P. C. 277.

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general law may have been originally founded on the tenth article of the edict, but the law is now virtually contained in the Code itself, into which the article of the edict has been transferred.

In the case of the *Chaudière Gold Mining Co. v. Desbarats*¹, indeed, the counsel on both sides argued on the assumption that art. X. of the edict was still in force. But their Lordships were then much disposed to take the view that the Code was, on the question then under discussion, declaratory of the law.

It is said in the judgment:—

“Their Lordships, however, cannot consider it to be their duty at this day to construe the edict as alone containing the law of Canada on the subject of mortmain, because a legislative declaration of that law is, in their opinion, contained in the Code, which is free from ambiguity.”

It is true that arts. I. and II. of the edict are not in like manner reproduced in the Code; but the question arises whether, even if they survived the cession of the province to the English Crown, they continue to have, since the Statutes on Wills above referred to and the Code, the force of law.

It is open to considerable doubt, whether the first nine articles of the edict, which all relate to the foundation of corporations, retained the force of law after the cession; first, because the forms and regulations they prescribed then became out of place; and, secondly, for the substantial reason that the articles, which had for their object to put fetters on the king's own power, could not, it may fairly be contended, be of force to control the sovereign will of the English Crown whose prerogative it would be, after the cession, to establish corporations. And it is to be observed that no instance has been shown where, since the cession, the law of these articles has been put in force.

But however this may be, their Lordships cannot but think that the second article of the edict is abrogated by the Code, as being contrary to or inconsistent with its provisions.

The free testamentary power of disposition in art. 831 is given, “saving the prohibitions, restrictions, and causes of nullity mentioned in this code.”

It has already been observed that no restriction directed against such bequests as the present is to be found in the Code, unless the prohibitions relating to gifts of immoveable property in mortmain (to be hereafter considered) can be held to apply to them. There is no such restriction with regard to moveable property.

Again, the introduction of the prohibitions with respect to immoveable property leads to the implication that no other restrictions, relating to gifts to corporations, or for the purpose of founding them, beyond those expressly mentioned, were intended to be imposed or retained.

It is impossible to suppose that if the provision of the edict in question was really in force at the time of the Code, and it was intended to preserve it, that the Code in dealing, as it does fully, with

¹ See Law Rep. 5 P. C. 277.

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testamentary dispositions, and in a series of articles under a distinct head with "the capacity to receive and give by will" (see title 2, ch. 3, s. 1), should have omitted all mention of it. Their Lordships, therefore, think they cannot treat the second article of the edict as a part of the existing law of the province relating to wills, and if this be so, there is nothing in that law, so far as the objection now under consideration is concerned, to affect the validity of the bequest of the moveable property.

But it is contended, secondly, that as regards the immoveable property the devise falls within the direct prohibition contained in Arts. 366 and 836 of the Code. Art. 366 is limited by its terms to the acquisition of immoveable property only; and Art. 836 must be limited by construction to such property. It is to be observed that Art. 836 appears to be founded on ch. 34, sect. 3, of the Consolidated Statutes of Lower Canada, which section embodied the provision of 41 Geo. 3, ch. 4, s. 1.

Both articles relate to gifts to corporations already formed. And the question is, whether a devise like the present, by which the property is given to fiduciaries, and is to pass from them to a corporation only in the event of its being lawfully created with permission to possess it, is within their scope. The devise in this case is to trustees for the primary purpose of establishing an institute, and for effecting that purpose they are to obtain a charter or act of incorporation.

It is said that this is, in effect, devising indirectly lands to a corporation, having no licence from the Crown or other legal power to hold them. But is this really the case? The devise is, in the first instance, to the trustees, and under it they are empowered, at least for a time, to hold and administer the property for the purpose of the trust, and until, in further execution of the trust, a corporation is created with authority to administer it. If a corporation with power to hold the property should be granted, the acquisition of it by such corporation would, before it vested, be sanctioned by law: whilst if it were not created, there could be no infraction of the law against holding in mortmain.

Apart, therefore, from the second article of the edict, there would seem to be nothing in principle or in positive law to render such a gift as the present illegal as a gift in mortmain. The direction to the trustees to procure a charter or act to incorporate a body empowered to hold the property and carry into effect the objects of the gift, necessarily implies a condition to be fulfilled previously to the vesting of the property; and the permission of the Crown to hold the lands would of necessity precede their acquisition by the Corporation, and render it lawful.

Commentators of high authority on French law have treated such dispositions, apart from the Edict, as clearly good, and numerous passages from their treatises to this effect are collected in the judgment of Mr. Justice Badgley. It is sufficient to cite one: Ricard, "Traité des Donations," No 113, says:—

"Lorsque les donations et legs sont faits pour l'établissement d'un monastère, on ne pourrait pas opposer le défaut des lettres patentes;

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ce qui est juste, parce que ces sortes de dispositions sont présumées faites sous condition, et pour avoir lieu, au cas qu'il plaise au Roi d'agréer l'établissement."

The same doctrine was sanctioned, and the grounds on which it rests were fully expounded by Lord Eldon in the case of Downing College, which in its circumstances bore some analogy to the present: *Attorney-General v. Bowyer*.¹

What the position of the trustees would be in case they failed to obtain a charter or act of incorporation, was the subject of some discussion at the Bar. If consistently with the intention of the testator they could carry into effect the purpose of the devise, and establish and perpetuate the institute by means of a perpetual succession of trustees, which their Lordships are not satisfied could be done by the law of Canada, it might be a question whether in such case the trustees would not be "*gens de main-morte*," and the devise, therefore, of the immoveable property *ab initio* void by virtue of Art. 836 of the Code. In that case Art. 869 might not avail to protect the devise. It is true that by this article a testator is empowered to appoint fiduciary legatees for charitable or other lawful purposes, but only "within the limits permitted by law." Now the Code undoubtedly prohibits the devise of immoveables in mortmain, and if the will had created trustees with power of perpetual succession, it might, as already observed, have been questionable whether the devise of the lands to such trustees would not have infringed this prohibition, and be, therefore, beyond the limits permitted by law.

But their Lordships think that this is not the character of the devise. It appears to them that the devise to the trustees was meant to be limited and transitory, the property remaining in them only until they could execute the ultimate purpose of the devise. It is true the primary trust is to establish the institute, but it is a cardinal part of the trust that, "for that purpose," the trustees are to procure a charter or act of incorporation, and as soon as it shall have been obtained, they are directed to convey the property to the corporation. There is no direction to convey to new trustees. The trustees are, indeed, empowered to sell such of the property as they deem expedient, to acquire property and to construct buildings, and to proceed to carry out the testator's designs, but only "up to such time as the property hereby devised to them shall be conveyed over to the Fraser Institute."

Art. 964 of the Code provides for the case of a "Legatee who is charged as a mere trustee to administer the property and to employ it or give it over in accordance with the will, in the event of the impossibility of applying such property to the purpose intended;" and directs that, in such a case the property, unless the testator has manifested an intention that shall it be retained by the trustee, shall pass to the heir. Their Lordships consider that an impossibility to apply the property in accordance with the will would in this case arise, if the trustees failed, after the lapse of a reasonable

¹ 3 Ves. 724.

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time, to obtain a charter or act of incorporation, and that in that event the property would pass to the heirs under the above article.

It was suggested that new trustees might be appointed in succession so long as the execution of the will should last under art. 923 of the Code, which is as follows, —

"The testator may provide for the replacing of testamentary executors and administrators, even successively and for as long a time as the execution of the will shall last, whether by directly naming and designating those who shall replace them himself, or by giving them power to appoint substitutes, or by indicating some other mode to be followed, not contrary to law."

But it was not in this manner the testator designed that the purpose of his will should be permanently carried into execution. It is true that he directs that three persons to be named by his trustees should compose with them the first board of governors of the institute, which he desired should always be composed of five persons, and of which Mr. Abbott was to be president for life, with power to them to supply any vacancy caused by death or resignation; but this is the scheme he provides for the governing body of the intended corporation, as is shewn by the direction which immediately follows it, viz, "that so soon as the requisite charter shall have been obtained containing all the powers necessary to carry out my designs herein contained," the property should be conveyed to the corporation. Their Lordships having regard to the scheme of the will, cannot think it was the intention of the testator to create, or attempt to create, a board of governors in perpetuity without the authority of a charter or statute, and so endanger his devise, at least as regards the immoveables, as being an unauthorized gift in mortmain.

The third and remaining objection is that the gift failed, being a gift to a society not in existence at the testator's death.

If the devise had been to a society or a corporation to be afterwards called into existence or created without the interposition of fiduciary legatees or trustees, this objection might have given occasion to difficulties of great weight.

It was said by the Court of first instance in *DesRivières v. Richardson*¹: —

"It may be admitted that, if by a will an immediate devise is made to a corporation not in existence, it will be void, as there is no such corporate body to receive, and it would be equally void even if the corporation were afterwards created without some special and express law to take the case out of the general principle.

But it was also said in the same case in the Court of Appeal: —

"The second ground of objection is also untenable, for although it is admitted that a legacy is lapsed (*i. e., caduque*), when left to an individual, or to a body politic and corporate, not *in esse*; yet the principle does not apply to this case inasmuch as the trustees were all alive when the testator made his will, and they received the bequest for the benefit of the Royal Institution, as soon as it should

¹ Stuart's Rep. 218.

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please the Provincial government to give to airy nothing a local habitation and a name."

That case no doubt differed in some of its facts from the present, as the Royal Institution had been, in some sense, incorporated before the date of the will; but the principle is asserted in it that the intervention of trustees will, in some cases at least, prevent a lapse.

Their Lordships on this point, having regard to art. 869, which permits the appointment of fiduciary legatees for charitable and other lawful purposes, and to art. 838, which, in the case of legacies suspended after the testator's death in consequence of a condition or substitution, declares that the capacity to receive is to be considered relatively to the time when the right comes into effect, are of opinion that there has been no lapse in this case, and that the trustees may carry the purpose of the testator into effect if and when the corporation of the Fraser Institute is duly incorporated. The transfer of the property to the corporation is directed to be made by conveyance from the trustees who, in then making it, will execute the lawful purpose for which the property was entrusted to them.

It is evident that the charitable and lawful purposes mentioned in art. 869 were not meant to be confined to such trusts only as may be created for the benefit of some definite persons. The use of the word "purposes" indicates that bequests may be made to uses for general and indefinite recipients so long as the purpose be charitable or lawful, and the bequests be within the limits permitted by law.

Their Lordships, for the reasons given, think that the devise in question complies with these conditions and ought to be sustained; and they will humbly advise Her Majesty to reverse the judgment of the Court of Queen's Bench, and direct that the suit be dismissed. But, considering that the law of Canada on the questions arising upon this will was in an unsettled state, their Lordships think that the heirs of the testator might reasonably dispute its validity, and that the parties, therefore, should pay their own costs of the litigation below and of this appeal.

LEGACY TO ADULTERINE BASTARD.

KING V. TUNSTALL ¹

55. The conjoint operation of the Imperial Act 14 Geo. III c. 83, and of the Canadian Act 41 Geo. III c. 4, is to abrogate the old law which prohibited gifts by will to adulterine bastards.

56. The said Canadian Act was only a declaratory Act as applied to the Imperial Act.

57. An adulterine bastard to whom a gift was made by substitution before the passing of the said Act, will be, as substitute, entitled to receive the substitution opened in his favour after the passing of the Act. *For their Lordships' remarks See LEGACY : capacity of the legatee.*

¹ Quebec, 1874 July 21, L. R. VI P. C. 55.

MUTUAL WILLS.

DENYSSSEN V. MOSTERT¹

58. According to the Roman-dutch law, the wife has alone the right to dispose by will of her share in the community between her and her husband.

59. The principles of the Roman-dutch law in respect to mutual wills made by husband and wife were thus explained by the Judicial Committee :

SIR ROBERT COLLIER, p. 526 :—By the Roman law the property of husband and wife was separate, and each was entitled to dispose of it at pleasure, either during life or by will.

The customs of the Dutch introduced community of goods between husband and wife, the husband being the administrator of the property, and holding the relation of curator or guardian to the wife ; and this community of goods was enforced and preserved by a strict prohibition of all contracts relating to property between husband and wife. On the death of either the survivor took half of the property ; the other half, in the absence of testamentary disposition, going to the heirs of the deceased.

Both husband and wife retained the power of disposing of their respective shares by will, and any agreement renouncing this power was void : *Voet ad Pandectas Lib. XXVIII, tit. 3, s. 10*.

By custom the form of mutual wills was introduced, which, sometimes adopted by persons not related to each other, became the common form of testamentary disposition between husband and wife. Much authority (as was to be expected) is to be found bearing upon wills of this description, and the following general rules of law may be treated as clearly established ;

First, that such wills, notwithstanding their form, are to be read as separate wills, the dispositions of each spouse being treated as applicable to his or her half of the joint property.

Second, that each is at liberty to revoke his or her part of the will during the co-testator's lifetime, with or without communication with the co-testator, and after the co-testator's death.

In support of these general rules of law may be cited :

Grotius Introduction to Dutch Jurisprudence, B. 1, c. v., sec. 25 ; B. 2, c. XVII s. 24 & notes.

Huber's Heden daaghe Reghtsgeleerheid B. II, c. XII ; *Schorex notæ ad Grotium*, B. II, c. XV, s. 9.

Vander Keessel, Thes. 298 B. II, c. XVII, s. 24 ; *Vander Linden*, institutes of the Laws of *Holland*, B. 1, ch. IX, s. 3, pl. 5, p. 129 ; and other authorities referred to in the judgment of Mr. Justice *Denyssen*.

The general rule being established, it next becomes necessary to ascertain the exceptions to it. They are stated by *Grotius*, B. II, c. XV, s. 9 (translated by *Herbert*).

The substance of this doctrine, though expressed in varying terms, is to be found in the leading authorities from the time of *Grotius* to the present day.

¹ Cape of Good Hope, 1872 April 23, VIII Moore 502.

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Van Leenwen, in his *Censura Forensis*, B. III, c. XI, s. 7.

A passage to the same effect is to be found in *Van Leenwen's* commentaries on the Roman-Dutch Law B. II, c. III, s. 8.

Their Lordships understand the expression, "*postquam hereditatem primi morientis adierit*"—"after he has adiated the inheritance of the predecessor" as equivalent to the "acceptance of benefits" spoken of by *Grotius*. "Adiation is a term well known to the Roman-Dutch Law, and although Mr. Justice *Connor* in the case of *Oosthuysen vs Oosthuysen* may be correct in saying that its technical sense as applicable to the institution of an heir may have become obsolete, it appears to be used by *Van Leenwen* and other writers, when applied to the survivor of two co-testators under a mutual will, in a sense equivalent to the adoption and confirmation of the will by the acceptance of benefits under it.

Many extracts from the *Hollandische Consultation*, translations of which certified by the Registrar of the Supreme Court of the Colony, have been sent to their Lordships, are in accordance with these doctrines, (among them may be cited vol. I, consultation 50; vol. II, consultation 53; vol. III, consultation 3; vol. IV, consultation 43). To the same effect are extracts translated and certified in the like manner from *Van der Berg's Nederlandsh Bæk*.

These authorities have been recognized and confirmed by three cases decided in the Supreme Court of the Colony, viz., *Brits v. Brits' Executors*¹; *Hofmeyr v. De Wet*²; and *Oosthuysen v. Oosthuysen*.³

In *Hofmeyr v. De Wet*, sir *John Wilde*, then the Chief Justice, thus lays down the law: "A Husband and wife may both make their testament in one and the same paper writing, but the paper is considered to contain two separate testaments, which each of them may always alter separately, and without the knowledge of the other, before as well as after the death of either of them; but if they have benefited each other reciprocally, and directed how the common estate is to go after the death of the survivor, if the latter has enjoyed or wishes to enjoy the benefit of it, such survivor can make no other last will or testamentary disposition of his or her share unless he or she had rejected the benefit made and ceded the same:—

In *Dothnyesen v. Dothnyesen*, Sir *William Hodges*, then Chief Justice, says: "If the joint spouses have benefited each other, and have jointly and by common consent directed how the estate shall go after the death of the survivor, such survivor cannot, after the adiation of the estate, and the enjoyment of the benefit, make another testament of his or her share of the joint estate."⁴

Much on the same principle it was decided by the Supreme Court of the Colony that an express renunciation by the wife during her husband's life of her right to a half of the joint property, and an agreement to accept in lieu thereof the provisions of his

¹ *Buchanan's Cape of Good Hope Cases*, p. 312.

² *Ibid.* " " " p. 317.

³ *Ibid.* " " " p. 51.

⁴ *Buchanan's Cape of Good Hope Cases*, p. 312.

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will, were not binding upon her after his death, but that the right of election remained : *Scorcy v. Scorcy's executors*.¹

It may be added that Mr. Burge, in his Commentaries on the Colonial Law, vol. IV, p. 405, lays down the same doctrine.

These authorities (to which more might be added) establish that the power which a surviving spouse generally has to revoke a mutual will as far as it affects half of the property, is taken away on the concurrence of two conditions :

First, that the will disposes of the joint property on the death of the survivor, or, as it is sometimes expressed, where the property is consolidated into one mass for the purposes of a joint disposition of it.

Second, that the survivor has accepted some benefit under the will.

It may be observed that these conditions appear to apply as much to a will made by one spouse with the authority of the other as to a mutual will in the strict sense of the word, i. e., a will executed by both.

It next becomes necessary to inquire what authority there is for rejecting the second condition and holding that a mutual will "consolidating into a mass" the joint property is absolutely irrevocable and unalterable by the survivor?

The main authority cited in support of this proposition appears to be a passage in *Peckins de Testam. Conjug. Lib. I. C. 43*.

It is to be observed that the authorities which *Peckins* cites in support of this proposition are not by his own statement of them directly in point inasmuch as they do not refer to wills of husband and wife and further, that it is not easy to conceive a testamentary contract by which one party is bound while the other is left free.

This doctrine, however, of *Peckins* is controverted by *Huber* in his "*Prælectiones*" lib. XXVIII, tit. 3, s. 4, who contends with much force than it is opposed to that law which prohibits contracts between husband and wife for prescribing the manner and extent to which the common property shall be enjoyed by the survivor.

A passage from *Coreu's Obs.* 12, p. 54, cited by the Chief Justice in his judgment confirms the view of *Huber*. After stating a case of a mutual will and adiation by the surviving wife, *Coreu* proceeds : "She had given her consent to the husband's disposing as he did, and then by adiating by her husband's inheritance, she bound herself by a quasi contract to the observance of his will." The quasi contract arose not upon her consent being given to the making of the will, (as the Chief Justice appears to read the passage), but on her election to accept the benefit of it after her husband's death.

It is to be observed, however, that *Van Leenwen*, in the extract before quoted from his *Censura Forensis*, in which he lays down "adiation" as one of the conditions necessary to deprive a surviving spouse of the power of revocation refers to the above cited passage in *Peckins* as an authority for his position, from which it would seem probable that reading the passage in connection with the context, he understood this condition to be implied. It is further to be observed

¹ Menzies' Cape of Good Hope Reps. B., 2, p. 231.

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that *Grænewagen* would appear to take this view, for in his note to the passage of *Grotius* above quoted, he also cites the same passage in *Peckins* as supporting the doctrine laid down in the text. If the passage is to be read with the qualification, it is consistent with all the authorities. Their Lordships have not found any other passage than the above in *Peckins*, in which a gift over of the joint property to children is suggested to be less revocable than such a gift to other relations, or indeed to strangers.

A passage from *Væt., de pactis dotalibus* (lib. 28, tit. 4, sec. 63) has been read, in which he does not mention "adiation" as necessary to deprive a surviving spouse of the power of revocation; but in as much as he cites the contract above given from the *Censura Forensis* it cannot be assumed that he intends to controvert its authority.

A celebrated cause, to which the will of *Phillip*, Duke of *Arshot* and *Johanna Van Halewyn*, his consort, gave rise wherein it was decided that the mutual will was irrevocable by the survivor, was cited on behalf of the respondent from *Decker* (Dissert. Jur., lib. I. C. I.), who reports his own argument at great length, but the decision somewhat shortly. Whether or not the survivor in that case had adiated, does not appear very clearly from *Decker's* report, but adiation may be inferred from the reference to the case in *Van Leenwen's Roman-Dutch-Law* (B. III, c. 3, s. 8), which is as follows: "When two married persons have reciprocally benefited each other, and directed how the goods of the common estate should devolve after the death of the survivor of them, such survivor, having enjoyed the benefit cannot dispose of his or her share by such rule; and so it was adjudged in the causes upon a will between *Phillip*, Duke of *Arshot*, and *Mrs. Johanna Van Halewyn*, his consort, by the High Court of *Mechlin*."

PRESUMPTION AGAINST See EVIDENCE: *iisdem verbis*.

PROBATE OF See EVIDENCE: *iisdem verbis*, INTERNATIONAL LAW: *lex domicilii*.

PROHIBITION FROM CONTESTING A

EVANTUREL V. EVANTUREL¹

60. A testator may validly insert a clause in his will, to the effect that if the legatees contest his will in whole or in part, they shall be excluded from the will and their legacies shall be forfeited. Such clause must be enforced by courts of justice.

SIR JAMES W. COLVILLE, p. 64:—The legal effect and validity of the conditional or penal clause are now to be considered.

It has been argued that this particular clause is so vaguely expressed that it should be held to be void for uncertainty. Their Lordships cannot accede to this argument, which seems to be prin-

¹ Quebec, 1874 July 4.

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cipally founded on the words, "faire, soit directement ou indirectement, aucune démarche quelconque pour contester mon présent testament." The terms, though general, seem to their Lordships to point to a contestation of the testament in a Court of Law, and to be made so general in order to embrace every form of legal proceeding wherein or whereby such contestation might take place. There is, therefore, no such uncertainty in the clause as might prevent its application.

A graver question raised is whether the law permits, or will give any effect to such a clause.

The reasons assigned in the formal judgment of Mr. J. Taschereau of the 6th of May, 1871, for treating the clause as "non écrite" (see Record, p. 8), may be shortly stated as follows:—

1. That in the circumstances of the case such a clause is contrary to public order ("l'ordre public," inasmuch as the law requires the observance of certain formalities in the execution of wills, the testable capacity of the testator, and the absence of fraud and undue influence; and the strict application of such a clause would favour the non-observance of what the law forbids by deterring persons from disputing wills which on one or other of the above grounds ought to be declared void.

2. That such a clause, unless under exceptional circumstances, and in the absence of probable or reasonable cause for disputing the disposition, ought to be considered as inserted only in *terrorem* and deemed to be comminatory.

3. That the Respondents in contesting the will had not acted in the spirit of chicanery, but had a just and probable cause for suspecting the validity of the will and requiring it to be proved by legal proceedings: and that the application or non-application of such a clause is, in the direction of a Court of Justice, to be exercised upon its view of the whole of the matters in dispute "l'ensemble du litige."

4. That in the opinion of the Court it was not the intention of the testatrix to deprive her daughters of their small legacies if they disputed the very valuable gift to their brother, on all or any of the grounds upon which the validity of the testament was in fact disputed, but only in the event of their disputing the justice of the distribution which she made of her property, and in particular the clause by which she discharged her from the liability of rendering any account as her agent.

The formal judgment of the Court of Queen's Bench (Record, pp. 274, 275), in support of the conclusion that "the clause, under the circumstances of the case, and considering the nature of the contestations of the testament by the Respondents, ought to be deemed 'non écrite,'" adopts and specifies the second and third of the above reasons. It is to be observed, however, that this document, which is the judgment under appeal, does not expressly declare the clause to be contrary to "l'ordre public," though many of the reasons given by Mr. Justice Badgley in the judgment delivered by him seem to favour such a conclusion; and further, that the words "vu la nature de la contestation du dit testa-

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ment," taken in connection with the judgment delivered, make it uncertain how far the final judgment of the Court of Queen's Bench proceeded on its erroneous view of the supposed abandonment of the grounds of fraud and undue influence which has already been adverted to.

The 760th article of the Code Civil (by which it is agreed on all hands that this case is governed), is in these words; "Gifts, *inter vivos* or by will, may be conditional. An impossible condition, or one contrary to good morals, to law, or to public order upon which a gift *inter vivos* depends, is void, and renders void the disposition itself, as in other contracts. In a will such a condition is considered as not written, and does not annul the disposition." This clause must be read in connection with the 831st, which declares that "every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will without reserve, restriction, or limitation, saving the prohibitions, restrictions, and causes of nullity mentioned in this Code, and all dispositions and conditions contrary to public order or good morals."

It appears to their Lordships that these articles suffice to dispose of several of the conclusions on which the judgments under appeal have been shown to be founded, of much of the reasoning of the learned judges in support of those conclusions, of many of the authorities cited at the Bar from ancient French writers, and of the arguments founded on those authorities.

For example, these articles of the Code, of which the terms are, in substance, hardly distinguishable from those of the texts of Justinian, leave no ground, if ground there ever were, for the proposition, repudiated, as Merlin (titre "Peine Testamentaire,") shows, by the best authorities, that the Theodosian Code, and, therefore, the Law of the Anthonies on this point, ought to prevail over that of Justinian, in countries governed by the Code of Paris. They also sweep away all the fine distinctions between real, and purely conditional dispositions which civilians have founded on the motives, real or supposed, of testators. But they do more. By declaring that a testator may impose upon his gift any condition not prohibited by the Code, and not contrary to law, public order, or good morals, they seem to cast upon Courts of Justice the duty of giving effect to all conditions, which do not fall within the above exceptions, according to the plain meaning and intention of the testator to be collected from his language. This consideration would dispose not only of the fourth, but of the second and third of the above-mentioned grounds for Mr. J. Taschereau's original judgment. Of the fourth, it may be remarked that it proceeds on one of those forced constructions of a testament which are tantamount to the making of a new will for the testator; and that it would in effect make the whole clause nugatory, since it would be idle to dispute particular clauses in a will duly executed by a testator of undisputed capacity, having a testamentary power over the subject matter disposed of, on the mere ground of the alleged injustice or unfairness of the disposition.

The second and third of the above mentioned reasons, being those adopted by the Court of Queen's Bench, are closely connected. It is

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stated by Merlin ("Répertoire de Droit," vol. ix, p. 227, titre "Peine Testamentaire") that little effect is given in practice to clauses of this kind; that "Paul de Castres and a number of other authors regard them as purely comminatory; so that the penalties which they prescribe are not incurred as of absolute right by a breach of the condition, but are inflicted only in very rare cases in which the suits brought by those whom the testator has forbidden to bring them, are found to have no other foundation than a spirit of calumny and vexation."

This implies not that the condition is in itself unlawful, or against public policy, but that either by an arbitrary rule of construction it is to be taken to import, however general may be its language, that the testator intended only to forbid the contestation of his will upon frivolous and vexatious grounds, or that there resides in the courts of Justice a discretionary power of giving or refusing to give effect to it, according to their view of the motives and conduct of those who shall be found to have infringed its letter.

There is nothing in the Code to warrant either of these propositions. The latter seems to rest upon the practice of the old French Parliaments; but the sort of dispensing or qualifying power so claimed and exercised by them has been condemned by the best Jurists, and repudiated in the courts of Lower Canada, as is shown by the authorities cited by Chief Justice Meredith, and in the notes of Mr. Justice Caron's judgment. And as the decisions of courts claiming to exercise this anomalous power are the foundation of the rule of construction assumed in the former of the two propositions, and the rule itself is opposed to the ordinary principles of construction, their Lordships think that that also, if it ever existed, must be treated as obsolete; and that, in order to support the judgment under appeal, the condition in question must be shown to fall within the exceptions expressed by the Code as being impossible, or contrary to good morals, to law, or to public order.

Impossible, or contrary to good morals, it clearly is not; it is not prohibited by any positive law; the disposition which it is designed to protect is neither contrary to law nor public order, since the testatrix had an absolute power of disposition over her whole estate; and the question is, therefore, reduced to this, viz: Is this clause contrary to public order, because it is designed to prevent the doing of that which it is against public order to discourage. In considering this question their Lordships will treat "public order" as identical with what in this country is termed "public policy," though the latter is perhaps the larger of the two terms. And they must deal with the proposition laid down by Mr. Bowering, and indeed involved in the judgment of Mr. Justice Taschereau, viz., that every condition which implies the prohibition to dispute a will as a whole, as distinguished from a particular clause in it, upon any grounds which affect the legal validity of the instrument as a testamentary disposition sins against public order, and must be treated as "non écrite." They must do this because as they have already shown there is no ground for treating, as the majority of the judges of the Court of Queen's Bench have treated, the Respondents as

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having contested the validity of the will merely on the grounds taken by the "inscription en faux," and also because there does not seem to be, in principle, much reason for the distinction taken by those learned judges. For if society has an interest in securing the trial of the question whether all legal formalities have been observed in the execution of a will, it seems to have an equal interest in the trial of the question whether a will has been obtained by fraud, or the exercise of undue influence from a person of imperfect capacity.

The question may be considered on principle, and on authority. Upon principle, it is to be observed that the prohibition cannot be absolute and can be invoked only where the validity of a will has been unsuccessfully contested. If there be a clear and patent defect in the formalities attending the execution of the instrument; or if the incapacity of the alleged testator be clear and notorious, heirs or other parties interested will, of course, contest the will, and contesting it successfully, will set it aside with the clause of forfeiture. On the other hand, it is not easy to see why a testator may not protect his estate and representatives against unsuccessful attempts to litigate his will, by saying to a legatee:—"I, being master of my own bounty, and free to give or to withhold, give you this legacy subject to the condition that you do not dispute the general disposition of my estate. You may contest the validity of my will if you please; but you will do so at the peril of losing, if it be established, what it gives you."

Then, is this view of the question opposed to the authorities?

The French authorities are reviewed at great length by Chief Justice Meredith on the one side, and Mr. Justice Badgley on the other

The result of them seems to be—

First. That such a clause would unquestionably be a *conditio rei non licitæ*, and therefore of no effect, if it were designed to protect a disposition contrary to public order, which is not here the case.

Secondly. That in the ancient jurisprudence there may be found texts which favour either side of the question, whether effect ought to be given to such a clause, when it goes to prohibit the contestation of the will as a whole; and some authorities which seem to recognize a distinction between contestations founded on the non observance of the formalities for the execution of wills; and contestations upon other and more general grounds. But,

Thirdly. That it is clearly established in France, by the concurrence of the best modern text-writers, and the decided cases, that such a condition is not contrary to law; and will be applied if on any ground, the will be disputed unsuccessfully; or, in other words, that the party disputing it does so at his own risk and peril.

Upon the second point it is, however, to be observed that one, at least, of the most important authorities cited by Mr. Justice Badgley is capable of an explanation which would bring the case supposed within the first category. He cites from Furgole the following passage:—"Si dans un testament qui est nul par quelque défaut de formalité, le testateur dit: 'Je veux que mon testament soit exécuté, et si quelqu'un de mes successeurs légitimes l'attaque

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pour le faire casser, j'institue héritier un tel hôpital," une telle disposition sera nulle et inutile quand même par quelque privilège de l'héritier institué, en cas de contravention, le testament ne manquerait d'aucune formalité, pour le faire valoir à son égard." It is obvious that this is a case in which the testator, having no original intention of bounty towards the hospital, makes the hospital, which under a special law was capable of taking under an informal will, his heir, in the event only of his legal heirs disputing the dispositions of his will, on the ground of its informal execution. The object, therefore, of the condition is to enable the real objects of his bounty to take under an instrument which the law declares to be invalid, and so to protect a disposition contrary to public order.

The Respondents meet the modern authorities by saying that, as they consist of the texts taken from the works of commentators on the Code Napoleon and the decisions of the French courts since the promulgation of that Code, they have little or no application to the present case. They are certainly not authorities which bind the courts of Canada. But they seem to their Lordships to be, nevertheless, extremely valuable aids towards the right determination of the question whether the clause under consideration is contrary to public order. The question is certainly not conclusively determined by the ancient authorities. On this point it is sufficient to observe that Ricard himself, who is one of those most in favour of the Respondents, admits that a penalty is allowable when designed to defend a lawful disposition, although he goes on, in article 1548, to show that the penalty is often, though not always, treated as comminatory. And the very fact that, under the old system, courts of Justice exercised a discretionary power in the application of such clauses, shows that they were not absolutely void, or (in French phrase) to be deemed "non écrites," as being contrary to law or public order.

We find, then, the modern French jurists, whether writing as commentators or actually administering justice in the courts of law, dealing with the question whether, after the old discretionary jurisdiction had been exploded, and the law reduced, as in Canada, to a written Code, such a condition is contrary to law. They have solved that question in the manner above stated; and the solution is, in their Lordships' judgment, agreeable to reason. The phraseology of the French Code differs only from that of the Canadian Code in that it does not use the words "ordre public," but declares only that conditions shall be "reputées non écrites" if "impossibles ou contraires aux lois ou aux mœurs." "L'ordre public" is, however, only the spirit or policy of the law, and the phrase is still used in some of the modern French cases when the question is whether the disposition to be protected is *res licita*. Demolombe, too (tome 18, p. 319, art. 287), after stating that the penal clause is applicable to the heir who fails in his contestation of the testament, says expressly, "Et telle est, en effet, la doctrine qui nous paraît devoir être admise, lorsqu'il s'agit d'une action en nullité, qui était fondée sur un motif d'ordre public."

It was well observed during the argument that the determination

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of what is contrary to the so-called "policy of the law" necessarily varies from time to time. Many transactions are upheld now by our own courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion. And, in dealing with the question before them, their Lordships think that very great weight is due to the opinions and decisions of modern French jurists.

Though the question is one to be determined by the law of Lower Canada, and not by that of England, their Lordships think it right to say something upon the English authorities which have been cited before them.

There are undoubtedly dicta and even decisions in some of the earlier cases to the effect that conditions of this kind were to be held to be *in terrorem* only, and, in the language of the *Touchstone*, "against the liberty of the law." But, in the case of personal legacies, effect was given to the condition if there was a gift over on the breach of the condition. The whole law on this subject appears to their Lordships to have been considered and put upon a sound foundation by the court of Exchequer in *Cooke v. Turner*, 15 M. & W., upon the case sent to them by the court of Chancery. It was suggested at the Bar that that ruling was not acted upon by the court of Chancery in the particular case. But, from the Report of that case in the 15th volume of Simon's Reports, it appears that though pressed to send the case before another court of Law, the Vice-Chancellor of England declined to do so, but directed, in the interest of the unborn issue of a marriage an issue so framed as not to involve the forfeiture by the legatees of their legacy under the clause assumed to be valid. The case of *ex parte Dixon*, 20 Law Journ. Chanc. N.S., which was decided by Lord Cranworth as Vice Chancellor, after his judgment in *Cooke v. Turner*, is supposed to conflict with the latter. But it does not really do so. No doubt the learned judge says of such conditions as the present that they had been "considered (whether justly or no is unnecessary to inquire) as contrary to the policy of the law." But he was not in any way called upon to decide that question; he was dealing with a condition of a very different kind, to which he gave effect. The real effect of the judgment is only that, if the conclusion be *conditio rei licite*, it ought to be enforced. It does not affect the authority of *Cooke v. Turner*.

Upon the whole, their Lordships have come to the conclusion that the preponderance of authority is, as well as principle, in favour of the judgment of the Superior court on review, and they will humbly recommend Her Majesty to reverse the judgment of the court of Queen's Bench, and to affirm the judgment of the Superior court, with the costs incurred in the court of Queen's Bench, and those of this appeal.

PROHIBITION TO ALIENATE OR TO SEIZE

RENAUD V. TOURANGEAU ¹

61. The testator, by his will, bequeathed all his property,

¹ Lower Canada, 1867 Dec. 13, V Moore N. S. 5.

PROHIBITION TO ALIENATE OR TO SEIZE.

moveable and immoveable, to his children, and directed that they should not in any manner incumber, affect, mortgage, sell, exchange, or otherwise alienate the immoveables devised by the will, until after twenty years from his death. A creditor of one of his sons seized in execution of a judgment one of the immoveables. The sale was opposed by the judgment debtor, on the ground that the will contained a prohibition to alienate, and that in consequence thereof the property was not liable to be seized for the debts of the legatee.

The court of Queen's Bench, on appeal, reversed the judgment of the Superior court, and held, that the restriction in the will was valid according to the law in force in Lower Canada. This decision was reversed by the Judicial Committee, as being contrary to the general principles of jurisprudence, as well as the old French law prevailing in Lower Canada, founded on the civil law.

62. A prohibition to alienate purely and simply is to be considered only as advice on the part of the person making the prohibition, and not binding upon the person to whom it is addressed.¹

LORD ROMILLY, p. 24:—Their Lordships are of opinion that it is not necessary to trouble Mr. Bompas, having heard Sir Roundell Palmer very fully, as we are all quite clear as to the principles and law to be applied to this case, we are of opinion that such a restriction as was made by the testator in his will was not valid either by the old law of France or the general principles of jurisprudence. We may add that we entirely concur in the reasons stated in the very able judgment of Mr. Justice Meredith, which has been forwarded with the record.

MUIR V. MUIR²

63. The condition attached to a legacy or donation prohibiting the seizure, sale or mortgage of the estate so given is legal and prevents the property from being seized in execution of judgment.

64. It also frees it from compensation as respects debts due to the testator or his estate by the alimentary debtor.

RATIFICATION OF**TUFNELL ET AL V. CONSTABLE ET AL³**

65. Although the instructions for a will may not have

¹ The Civil Code has modified these principles. Now, unless the expressions used are evidently within the limits of mere advice, the prohibition to alienate is effective although the motives of the prohibition are not apparent. See Civil Code, art. 972.

² Quebec, 1873 Dec. 9, L. R. V P. C. 66.

³ England, 1835 April 11, III Knapp 122.

"necessarily held now by ve avoided as remains, but e time being estion before is due to the

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a some of the vere to be held he *Touchstone*, e of personal a gift over on subject appears upon a sound *Turner*, 15 M. Chancery. It acted upon by om the Report it appears that urt of Law, the directed, in the framed as not e legacy under the *Dixon*, 20 Law unworth as Vice is supposed to . No doubt the at that they had eary to inquire) not in any way ith a condition of real effect of the *ei licite*, it ought *ooke v. Turner*. e conclusion that ple, in favour of hey will humbly of the court of Superior court, bench, and those

TOURANGEAU¹ all his property.

RATIFICATION OF

originated with a testator, yet his subsequent approval of them is sufficient to render his will valid.

REPUBLICATION OF WILL BY ANOTHER

HUGHES V. HASKING¹

66. The execution of a will or codicil referring to a pre-existing testamentary instrument is a recognition, and is equivalent to a republication of the previously executed will, and, therefore, a residuary clause contained in the last instrument must be read as if there had been a republication in the more ordinary form of the will itself. But if it contained a residuary disposition, referring to the same property as that devised by the will, property which the testator possessed at the date of the will, this presumed intention of the testator is destroyed and the first will cannot be considered as republished.

67. Where a testator, in a subsequent codicil, expressed himself as follows: "I hereby revoke and annul such part of my said bequest as relates to my own right heirs, and hereby devise and bequeath the same real estate, in the event of my son's death without issue to all the children of my nephew who shall be then living", the Judicial Committee held, that this did not amount to a republication of the will previously made, and that what passed to the children of the nephew was the real estate the testator was possessed of at the time of the will, but not the real estate subsequently acquired. As to that part the testator died intestate.

THE RIGHT HON. T. PEMBERTON LEIGH, p. 12:—Now, the rules of law which are applicable to this subject have been conclusively settled by authority. A will at the date of the instrument in question could only pass estates which the testator had at the time, and if, therefore, he afterwards purchased other real estate, it became necessary for him to make a new testamentary disposition, for the purpose of disposing of that after acquired estate. He might make that new testamentary disposition either by a codicil directly applying to it, or by a new will, or, if the words contained in the old will were sufficiently extensive to include all that he possessed, then the clause contained in the old will would be read as if it had been introduced into a new will at the date of the codicil. The effect of such further disposition obviously and necessarily would be, to include in the residuary devise all that he possessed at the time of its execution.

In the case of *Acherly v. Vernon* (Comyn's Rep. 381; S. C. 3 Bro. P. C. Toml. Edit. p. 83, 2 Eq. Ca. Ab. 769, pl. 1), this principle was

¹ New South Wales, 1856 July 14, XI Moore 1.

REPUBLICATION OF WILL BY ANOTHER

carried to an extent, as to the propriety of which great doubts have been, and as it appears to us reasonably, entertained. For it was there held, that the effect of a codicil referring to an existing will was not merely to amount to a recognition of that will in the state in which it existed and to the interpretation which it then bore, but that the effect of it was to bring down the date of such will to the date of the codicil, and, therefore, in truth not merely to recognize the existing instrument, but to create a new instrument. This case was followed by other cases, which in effect declared that the execution of a codicil is a recognition, and equivalent to a republication of the previously executed will, and, therefore, that you must read the residuary clause contained in the codicil, just as if there had been a republication in the more ordinary form of the will itself.

This principle, whether reasonable or not, was at all events not open perhaps to any great objection so long as there was nothing in the codicil itself inconsistent with that construction: but, if a codicil contained a residuary disposition, referring to the same property as that devised by the will, property which the testator possessed at the date of the will, it was quite impossible that you could impute to the testator a presumed intention which his declared intention in the codicil expressly contradicted. You could not read the clause in the will as contained in the codicil; if you found in that very codicil a clause directly inconsistent with that interpretation. That was the case of *Bowes v. Bowes* (2 Bos. & Pul. 500), which was considered by Lord *Kenyon* as a perfectly clear case. In that case the testator by his will made a general devise of his real estate to trustees upon certain trusts; he afterwards purchased other real estates, and then made a codicil; and by that codicil, after reciting that he had by his will devised all his real estates to two trustees, he thereby revoked that devise, and gave all his "said lands, tenements, and hereditaments" to two new trustees. And it was held by the House of Lords that the will was not republished so as to pass real estate acquired between the dates of the will and the codicil, on the ground that the word "said" confined the operation of the codicil to the lands which had actually been devised by the will. And it seems certainly to have been very difficult to contend that under such circumstances you could introduce into the codicil an intention to dispose, not of those estates which by the codicil he declared his intention of disposing of, but to dispose of those estates which were not included in the will, and, therefore, by the express language of the codicil, were excluded from the codicil.

Bowes v. Bowes was followed by *Monypenny v. Bristow* (2 Russ. & Myl. 117), and by *Hughes v. Turner* (3 Myl. & Keen. 666), and these cases do not carry the principle further. The case of *Hulme v. Heygate*, (1 Meri. 285), which was referred to in the argument, is not in the least degree inconsistent in principle with those authorities. There the testator made a will containing a general devise of all his real estate whatsoever, upon certain trusts: he afterwards purchased other real estates, some of which were conveyed to him before the date of the codicil, and others for which he had contracted, had not been conveyed. Those last estates, however, were

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REPUBLICATION OF WILL BY ANOTHER

in equity as much his property as those which had been legally conveyed to him. By the codicil he expressly devised the estates which had been conveyed to him, and he expressly ratified and confirmed in all other respects his will. It was, therefore, a case in which there was a clear declaration according to the principles established in *Acherly v. Vernon*, that the will to be read with the residuary clause as applying to the time at which that codicil was made, and not as confined to the time at which the will was made; and the only question was, whether because the testator had made a devise of two of the estates expressly, you could, therefore, infer that he did not intend to devise under the residuary clause those estates which, but for the previous devises, would clearly have been included. Sir *William Grant* decided that the codicil amounted to a republication of the will, so as to pass the estates contracted to be purchased between the dates of the will and codicil.

The question, therefore, in these cases is simply this: Does or does not a codicil, which is supposed to have the effect of extending the operation of the will, by its language exclude that interpretation? Is there, or is there not, contained in the codicil, a declaration, that the property with which the testator is intending to deal, is the same property with which he had dealt by his will—or does he intend only to alter the objects of its destination, and in no degree to affect its substance?

REVOCATION OFHENFREY v. HENFREY¹

68. A testamentary paper, disposing of the whole property, is a revocation *in toto* of a previous will, also disposing of the whole.

THE RIGHT HON. DR. LUSHINGTON, p. 34:—The question to be decided is whether the subsequent paper is a total or a partial revocation of will first executed—whether it be a codicil to it or not; for I greatly doubt if in any possible view of the case, probate could pass of the two papers as containing the will. I know not of any case resembling this, of two executed papers receiving probate as containing the will. *Ingram v. Strong* (2 Phill. 312, 313).

Then the question is, total revocation or partial revocation. On this question, Sir *John Nicholl* says in *Methuen v. Methuen* (2 Phill. 426), "In the court of Probate the whole question is one of intention;—the *animus testandi* and the *animus revocandi* are completely open to investigation in this Court."

In deciding this question, reference is always had in the first instance to the instruments themselves, which of necessity involves for this purpose, though containing the *animus revocandi*, the construction of the papers; of this there never was or could be any doubt, for it was literally the daily practice of the Court; the doubts which did arise as to the extent which the Court would or must go in the construction of instruments, was as to the construction

¹ Canterbury, 1842 Feb. 14, IV Moore 29.

REVOCATION OF

of powers, not of the testamentary instruments made under them, for the purpose of ascertaining the *animus testandi* and *Hughes v. Turner* (3 Hagg. Ecc. Rep. 30) settled that, even in the case of powers, the Court was not at liberty to relieve itself from the task of construing the power itself.

In this case there are no facts or circumstances or other evidence, and the conclusion must be drawn from the instruments themselves exclusively.

Now the testator, by the will of 1839, must be presumed to have intended to make some alteration in his testamentary disposition; but if the words of that instrument are to be limited according to the construction attempted to be put upon them by the Appellant, the only possible alteration would be to give the books in addition, if they do not pass before, by the words "household effects," but this limitation would be wholly inconsistent with the large terms in which the bequest is framed. The words "I hereby leave all I possess in this world," would *prima facie* import a bequest of all which the testator had the power to bequeath. Then are they qualified and restricted to what on the face of the papers appears but a small part? The word "containing" may certainly admit of being construed as meaning "inclusive," and not as taxative of the general bequest, and this clearly appears to their Lordships to be the true construction.

Then, the will of 1839 gives the whole property to the wife. On what possible principle can it be contended that it does not revoke the former will? Can two wills, both disposing of the whole property, be included in one probate? Can the will of 1838 be joined in probate with the will of 1839? Such a course would be against the whole practice of the Court, and productive of utter confusion and litigation. Sir John Nicholl, in *Masterman v. Maberly* (2 Hagg. Ecc. Rep. 236), said, "Is there any instance where two papers, both complete as to the disposition of personalty, and where the only defect of the second paper is a want of due execution, have been admitted to probate as together containing the last will?" And in that case there was much less objection, for the second set of papers was unexecuted. But it is said that there is no revocation of the appointment of executors, and that the case of *Beard v. Beard* (3 Atk. 72) is an authority for the prayer now made; but that case was totally different. In that case there was no revocation of the will, as a will, by any subsequent testamentary paper. The operation of the will was prevented by deed-poll; so it might be by bankruptcy, loss, or giving away of property, or death of legatees; but into such facts a Court of Probate never inquires; it knows nothing but of revocation by subsequent will of the instrument itself, or legal or presumed revocations of the instrument itself, as cancellation; or, before the late Statute, marriage of a woman, or marriage and birth of a child.

As to the authority from *Swinburne*, that doctrine has been exploded so far back that it would be difficult to trace it, and the rule stated by Sir J. Nicholl established, viz., that a paper, disposing of the whole property, is a revocation *in toto* of a previous will,

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CUTTO V. GILBERT ¹

69. The testator executed a will in 1825. In 1852, he made another testamentary paper bearing the inscription : "This is the last will and testament...." But the contents of this last instrument were not known ; and at the death of the testator in 1853, the paper itself could not be found, but there was no evidence of its destruction. The Prerogative court held, that the instrument executed in 1852 was not to be considered as a codicil, but as a substantive will, which operated as a revocation of the prior will of 1825, and that, under the Statute of wills, 1 Vict., ch. 26, sec. 22, the deceased must be considered to have died intestate, as the former will was not revived by the destruction of the latter.

This judgment was reversed by the Judicial Committee, which maintained the will of 1825, and granted probate of it. The reasons of the Committee were the following :

First. That the *onus probandi* lies upon the party setting up the subsequent instrument as a revocation of the former will.

Second. That to establish a revocation of a former will relating to personalty, by a subsequent testamentary paper not forthcoming, and by parol evidence of execution only, in the absence of any draft or instructions for such instrument, the evidence must be strong and conclusive as to its contents.

Third. That the mere fact of such an instrument commencing with the words, "This is my last will and testament," does not render it a revocatory instrument ; as those words do not necessarily import that such instrument contained a different disposition of the property ; and that to make it operate as a revocation of a former will, it must be proved that the contents of the later instrument were different from the former.

Fourth. That a subsequent will (the contents of which were unknown) having remained in the custody of the deceased and not forthcoming, the presumption of law was, that it was destroyed by him *animo revocandi*, and did not revoke a prior will uncanceled.

Subsequent to the Order in Council made upon the appeal reversing the sentence of the Prerogative court, a will dated March, 1851, was discovered, and an application

¹ Canterbury, 1854 July 7, 1X Moore 131.

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was made to the Judicial Committee for probate. On this application the Right Hon. Dr. Lushington for the Committee remarked:

It appears to us that the suit having been concluded, we have no jurisdiction in the matter, and that you must almost of necessity petition Her Majesty to refer the case specially to us.

Upon such petition being presented and referred, the Committee revoked the probate of the will of 1825, and granted probate of the will of 1851.

THE RIGHT HON. DR. LUSHINGTON, p. 142:—It would be impossible to contend that the mere execution of a testamentary paper, subsequent to the will of 1825, would be a revocation, for it might be a codicil only, it might be confirmatory; and as the *onus probandi* is upon the Respondent to show that it was revocatory, such revocation could never be established by proving the execution of a testamentary paper only; and in effect the question comes to this, whether the evidence of *Floyd*, stating that the paper commenced with these words, "This is the last will and testament," and the remark to *White* that he had executed his will, works a revocation in law, such will being not forthcoming, and the other contents of the will being totally unknown.

In order to disencumber this case of some of the authorities which have been cited, we will observe that it is simply a case of revocation or non-revocation at the time of the execution of this paper of 1852. Some of the cases are mixed up with arguments as to revival, but under the Statute of wills, 1 *Vict.*, c. xxvi, sec. 22, there can be no revival of a will revoked by the execution of another will, except by re-execution, or by a codicil duly executed.

The will of 1852 remained in the custody of the deceased, and the presumption of law, as it was not forthcoming, is, that he destroyed it *animo revocandi*, but the so doing cannot, since the Statute of wills, operate as a revival of the former will.

The simple question, therefore, is, whether by the execution of a paper commencing, "This is the last will and testament," a revocation of a former will has been effected, the paper so commencing, "This is the last will," &c., being destroyed by the testator himself.

It is difficult to discuss this question upon reasoning as to what would be the best and the most advisable rule to govern such cases, because it is manifest that the state of circumstances creates wide differences; for instance, to lay down a rule that the destruction *animo revocandi* by a testator of a subsequent will, will necessarily leave in force a will made thirty years before, under totally different circumstances, and, perhaps, wholly forgotten, might have the effect of giving force and efficacy to an instrument which would be wholly contrary to the intention of the testator. On the other hand, to say that a will destroyed by the testator, *animo cancellandi*, should always revoke a prior instrument, might in very many cases leave a testator intestate, whose only object in the cancellation of his will was, that his former will might take effect.

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Leaving, therefore, the discussion of such difficulties as these, which would be incidental to any general rule, let us consider what is the legal authority upon this question.

And first, with respect to common law authority as to devises. Upon that, we apprehend, there can be no dispute, that in order to revoke a devise of real estate by a subsequent will not forthcoming, it must be proved that the contents were different. But assuming, for the purpose of the argument, that a distinction may be drawn as to devises of real estate, and bequests of personal property, we will not ground our judgment upon such cases; but this, however, we must observe, that with respect to the construction to be placed upon the words, "This is my last will and testament," it is difficult to suppose that such words could receive one interpretation at Common Law, and a different construction in the Ecclesiastical courts.

We will proceed then to consider what are the authorities from the Civil law, and there no doubt, it is laid down that a prior will is revoked by the execution of a subsequent one. Whether that proposition was universally true, even by the Civil law, in the case of two wills having the same contents, it may not be necessary to inquire, for the true question is, how far this doctrine of the Civil law has been incorporated into the testamentary law, as administered in the Courts exercising jurisdiction over wills of personal estate. Now, the first case that we have reported at length upon this subject, is the case of *Helyar v. Helyar* (1 Lee, 511), and there Sir George Lee expresses his opinion in the following terms:—"I was of opinion that the executing of a second will of a different import was by law a revocation of the first, though the second does not now appear." These words deserve great consideration, for, upon that occasion, all the authorities from the Civil law, as to the revocation of a will by the execution of a subsequent one, were cited, and yet Sir George Lee qualified the proposition by the insertion of the words "of a different purport." Many prior cases of such a revocation were cited, *Whitehead v. Jennings*, for instance, referred to in 1 Phillimore, 412, and there is not a single case brought forward in which a will was held revoked by the execution of a subsequent one, the contents of which were wholly unknown.

Why, in the cases of *Whitehead v. Jennings*, and *Burt v. Burt*, the former wills were held to be clearly revoked by the appointment of a different executor, might, perhaps, be explained by reference to the Civil law, and the effect by that law of appointing an executor; and the fact that these circumstances wrought the revocation is *prima facie* proof that such or similar circumstances were indispensable to a revocation; and that without them the mere execution of a subsequent will would not revoke. We need not further advert to the case of *Helyar v. Helyar*, because it was decided upon the ground that the contents of the subsequent will were wholly different, and the evidence to that effect was supported by the probabilities of the case.

The case of *Moore v. Moore* (1 Phill. 375) is so very complicated in its circumstances, that no safe conclusion can be drawn from that case as to the question of law now in debate; and it is not quite

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correct, as stated in the marginal note, that the two wills were nearly of similar import. In the one case the property was given to the two sons; and by the second will, to one son only. But there is a case appended in a note to *Moore v. Moore*, namely, the case of *Passey v. Hemming* (1 Phill. 439), in which we have the high authority of Sir William Wynne, to the following effect:—"Now, I think, that in all the cases in which it has been held that the former will was revoked by the cancellation of the latter, it appears that the intention of the deceased was varied; consequently, it was proof that he departed from the intention of the first paper."

We will next advert to the case of *Henfrey v. Henfrey*. This was simply a case of construction, whether two papers should be taken together, or whether the latter was a revocation of the former. We see no reason to doubt the correctness of that judgment, nor can we see how that case applies to the present. There the second paper disposed of the whole property of the testator, and was necessarily a revocation of the former. One more case decided in the Ecclesiastical courts remains to be noticed, upon which the learned Judge in the court below seems mainly to have founded his judgment, the case of *Plenty v. West* (1 Robert. 264). Upon this case we will first observe, that the two wills were essentially different; that no executors were appointed by the first; that executors were appointed by the second; and the only ground of argument for uniting the papers was, that the whole of the personal estate was not disposed of by the second will. It is true, that Sir Herbert Jenner *Fust*, in his judgment, relies upon the fact, that the testator called the will of 1838 his last will, but that is only one circumstance in conjunction with others, on which he founded his decision.

Now, let us consider how these authorities bear upon the present case. There is not one authority which lays down the proposition that the execution of a subsequent will destroyed *animo revocandi* by the testator, the contents of which are not known, revokes a prior will. On the contrary, in all the cases where revocation has been held to be effected, there has been proof of a difference of disposition. These considerations alone would induce us to doubt the correctness of the judgment in the court below, in the case now under consideration; but the very foundation of that judgment appears to us to be unsound; that judgment is mainly based upon the evidence that the latter paper contained the words, "This is my last will and testament." We are of opinion, that these words do not import that the paper contained a different disposition of the property, nor that the mere fact of so calling it could possibly render it a revocatory instrument. We think that the interpretation put upon these words by Lord Truro, in his judgment in the case of *Stoddart v. Grant* (1 Macq. Sc. Ap. Cas., 171), is the true meaning to be attributed to them. With regard to any auxiliary circumstances in this case, we think that the evidence wholly fails to render any assistance to the case of the Respondent.

Considering, therefore, that the Respondent, upon whom the *onus probandi* lies, has failed to prove what the law requires, the execution of a subsequent will expressly revoking the former, or of

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different contents, we must reverse the judgment of the court below, and pronounce for the will propounded by Mr. *Cutto*. Each party to pay their own costs in this court.

SUCCESSION DUTY.

BELL V. THE MASTER OF EQUITY OF THE SUPERIOR COURT
OF VICTORIA ¹

70. In England, the probate duty is a stamp duty payable according to the value of the estate referred to in the will proved. In Victoria, it is more in the nature of succession duty, and is payable by the estate, whether the will is proved or not.

ARMYTAGE V. WILKINSON ²

71. Where a testator bequeathes all his property, real and personal, to his widow and children, with limitation in favour of his grand-children, and in trust in the hands of executors, duty is chargeable only at the lower rate contained in the Statute, that is five per cent.

BLACKWOOD V. THE QUEEN ³

72. The probate duty is a tax on the property to which probate gives title, and is levied at a time prior to administration. The legacy duty is imposed on the property which actually falls to the legatees and is levied at the time when the enjoyment accrues.

The Act of 1870: "Duties on the estates of deceased persons", does not make any such distinction; it imposes a single duty on the property of deceased persons.

WRIT OF ERROR

See APPEAL: *iusdem verbis*.

WRITS OF PREROGATIVE**HABEAS CORPUS.**

In re BELSON ⁴

73. The Lord Chancellor in England may issue under his fiat a writ of *habeas corpus* pursuant to an order of the court of Chancery in vacation, and this writ of *habeas corpus* sealed in the office of the Clerk of Records and Writs, is a common law prerogative writ which the Royal court in Jersey is bound to register and to execute.

MANDAMUS. See MANDAMUS.

¹ Victoria, 1877, April 24, L. R. II Appeal Cases 560.

² Victoria, 1878 Feb. 22, L. R. III Appeal Cases 355.

³ Victoria, 1882 Nov. 22, L. R. VIII Appeal Cases 82.

⁴ Jersey, 1850 Jan. 24, VII Moore 114.

SCIRE FACIAS.

THE QUEEN V. HUGHES¹

74. The proper remedy against charters or grants of the crown which are contrary to law, or uncertain, or injurious to the rights and interests of third persons is by writ of *scire facias*. And, if the grant or charter is to the prejudice of any person, he is entitled as of right to the protection of this prerogative remedy. *The Eastern Archipelago Company v. The Queen*, 2 E. & B. 94; *The Queen v. Clarke*, 7 Moore P. C. Cases 77.

75. The writ of *scire facias* to repeal or revoke grants or charters of the crown being a prerogative judicial writ must be founded on a record.

76. In South Australia, leases of waste lands sealed, but not recorded in any court, are not record, and cannot be annulled by *scire facias*.

LORD CHELMSFORD, p. 448;—For, as was said by Chief Justice Jervis, in the case of *The Eastern Archipelago Company v. The Queen* 2 E. & B. 94, "To every crown grant there is annexed by the common law an implied condition that it may be repealed by *Scire Facias* by the crown, or by a subject grieved using the prerogative of the crown upon the fiat of the Attorney-General."

¹ South Australia, 1865 Dec. 22, 111 Moore N. S. 439.



APPENDIX "A"

BRITISH COLONIES AND NATURE OF THEIR CIVIL LAW.

GENERAL REMARKS.

a. The authority of the British Crown over the numerous colonies which form part of the empire is derived from various sources. Some of them are countries conquered over the native inhabitants or over independent States; others were uninhabited countries discovered and peopled by English subjects—these are generally called "settlements"; others again are lands peopled by infidels and acquired either by treaty or by progressive settlement which introduced into them, first, European civilization, and afterwards, as a consequence, English authority.

In conquered countries, as a general rule, the existing laws of the inhabitants remain in force. In settlements, the English law is alone applicable. In colonies created by settlement, conquered, or obtained by treaty with the infidels, the law of England is applied to British subjects, and the native law to the infidels. However, where no native law is found for special cases, recourse is had to English law. Of course, these principles may be, but seldom are, modified by treaty or by the authority of Parliaments.

In all the colonies, the criminal law is that of England. But, to a greater or less extent, both the civil and criminal law have been, in every colony, altered by Parliaments, Charters of justice, Crown's and Governors' ordinances.

b. *Maltese Law.*—The laws of the Island of Malta were codified, in 1784, by the Great Master of the Order of Malta, Emmanuel de Rohan. They consist of the Sardinian law, amended by the local ordinances. In cases not provided for, the dispositions of the Sardinian civil code or of the Roman law as found in the *Corpus Juris civilis* are applied.

c. *French Law.*—France, before the *Code Napoléon*, which came in force in 1803, was divided in *pays de droit écrit* and *pays de droit coutumier*. The first comprised all the provinces which admitted

the Roman law ; the others were governed by their own Customs. There were three hundred and sixty Customs ; sixty of which were general, and three hundred, local ; the principal ones were those of *Paris, Orléans* and *Normandie*. Most of them were reduced to writing. Notwithstanding this distinction, the Roman law was everywhere, throughout France, considered as the common law. The only difference was that in the *pays de droit coutumier*, the Roman law was applied only in the absence of any provisions in the Custom (*Loyseau liv. 2. ch., 6, 5.*). The *Code Napoléon* has abolished all previous laws.

d. Roman-Dutch law.—The Roman-Dutch law is the old Roman law as altered by the ordinances of the kingdom of Holland. Hollanders or Dutchmen where in the last centuries great navigators. They discovered and established numerous colonies in Asia and Australia, a great number of which are now under the authority of the English Crown. In these countries, they introduced their laws, and the inhabitants have preserved them until our time. A Dutch code was made in 1838.

e. Spanish Law.—The kingdom of Spain established its laws in the colonies created by it in America. They were the old Spanish laws having its sources in ancient usages, Canonical law, Roman law, decisions, decrees and Government ordinances. Spanish laws have been since codified.

COUNTRIES.	COLONIES.	LAW.	REMARKS.
EUROPE.	Malta	Sardinian.....	Ceded by France: treaty of 1874. <i>See b.</i>
	Gibraltar.....	English.....	Conquered over the Spanish in 1704. Ceded by the treaty of Utrecht in 1713. English law was introduced by charters of justice: 7th Geo. I; 18th and 26th Geo. II; 57th Geo. III.
	Heligoland.....	Danish.....	Ceded by Denmark in 1814: treaty of Kiel. The Danish law is very nearly similar to the Roman-Dutch law. This island is governed by a civil code in 14 articles. Ceded to Germany in 1890. <i>See d.</i>
	Jersey	French (<i>Custom of Normandy</i>).....	Ceded by France in 1200: treaty of Breteigny. <i>See c.</i>
	Guernsey.....	do do ...	Brought to the English crown with the duchy of Normandy by Henry I, in 1100. <i>See c.</i>
Channel Islands.	Isle of Man.....	English.....	Bought from Earl Derby and Duke of Athol, in 1765. <i>See a.</i>

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COUNTRIES.	COLONIES.	LAW.	REMARKS.
ASIA.			
<i>British India</i>	Bengal (<i>Port Wil- liams</i> ¹).....	Roman-Dutch and native.....	Conquered over the Mogols in 1765. Capital: Cal- cutta 1. <i>See a.</i>
	North West Pro- vinces (<i>Oudh</i> , ¹ <i>Allahabad</i> ¹ and <i>Agra</i> ¹).....	English and na- tive.....	Conquered in 1803. <i>See a.</i>
	Punjaub.....	do do ...	Conquered in 1840. <i>See a.</i> Capital: Lahore. 1.
	Central Provinces	do do ...	Constituted in 1861 with differeents territories con- quered over the natives. <i>See a.</i>
	British Burmah (<i>Rangoon</i> ¹).....	do do ...	Ceded by the Burmese in 1826. <i>See a.</i>
	Assam.....	do do ...	Ceded by the Burmese in 1826; incorporated in 1838. <i>See a.</i>
	Madras (<i>Madura</i> ¹)	Roman-Dutch and native.....	Ceded by the Radjah of Bijjanagor in 1839. <i>See</i> <i>a, d.</i>
	Bombay.....	do do ...	Brought to the English crown by Catherine, a Portuguese princess, wife of Charles II, in 1661. <i>See a.</i>
REMARKS.	<i>British Posses- sions in the East</i>	Aden.....	Roman-Dutch
		Ceylon.....	do do ...
		STRAITS SETTLE- MENTS COMPRISING.
		Singapore.....	English and na- tive.....
		Penang or Prince of Wales Island	do do ...
		Wellesley.....	Roman-Dutch and native.....

Ceded by France: treaty of
1874. *See b.*

Conquered over the Spanish
in 1704. Ceded by the treaty
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code in 14 articles. Ceded
to Germany in 1890. *See d.*

Ceded by France in 1890:
treaty of Broitigny. *See c.*

Brought to the English
crown with the duchy of
Normandy by Henry I, in
1100. *See c.*

Bought from Earl Derby and
Duke of Athol, in 1785.
See a.

¹ In the reports of legal cases, this town is given some times as being the colony
from which the appeal came.

COUNTRIES.	COLONIES.	LAW.	REMARKS.
ASIA.	STRAITS SETTLEMENTS COMPRISING:		
<i>British Possessions in the East</i>	Dinding	English and native	Conquered in 1827. <i>See a.</i>
	Malacca	Roman-Dutch and native	Conquered over the Dutch in 1825. <i>See a, d.</i>
	Cocos or Keelings Islands..	English	Settlement of 1823. <i>See a.</i>
	Hong Kong.	English and native	Ceded by China in 1842: treaty of Nankin. <i>See a.</i>
	Cyprus	do do ...	By a convention between England and Turkey, in 1878, this colony was put under British government for as long as Hatoun and Kars may be kept by Russia.
	British North Borneo ¹	do do ...	Conquered over the Maltese and Javanese pirates in 1846. Ceded by the Sultan of Bornei in 1877. <i>See a.</i>
	Labuan	do do ...	Ceded by the Sultan of Borneo, in 1846. <i>See a.</i>
	Saramak ¹	do do ...	Ceded by the Sultan of Borneo, in 1842.
<i>China and Japan</i>	Shanghai	English	Consular Court established in 1865.
<i>Turkey</i>	Constantinople...	do	Consular Court.
AMERICA.			
<i>Canada</i>	Quebec (Lower Canada before the confederation of 1867)...	French (Custom of Paris)	Conquered in 1759, ceded by France in 1763: treaty of Paris. A Civil code came in force the 1st August 1866. The previous laws are not abolished. The Code is very nearly similar in principle to the Code Napoléon. <i>See c.</i>

¹ Since the 1st January 1890, the administration of British Borneo, Labuan and Saramak has been transferred to the British North Borneo Company.

REMARKS.	COUNTRIES.	COLONIES.	LAW.	REMARKS.
	AMERICA.			
red in 1827. See a.		Ontario (<i>Upper Canada before the confederation of 1867</i>)...	English.....	Peopled by English. Ceded with Quebec. See a.
red over the Dutch 25. See a, d.		New Brunswick	do	Part of Acadia. Conquered over the French in 1666. Ceded in 1713. The Acadians were dispersed and replaced by English settlers. See a.
ment of 1823. See a.		Nova Scotia.....	do	Part of Acadia. Conquered over the French in 1666. Ceded in 1713. Capital. Halifax (1.) See <i>New Brunswick</i> .
by China in 1842 : y of Nankin. See a.	<i>Canada</i>	Prince Edward Island	do	Ceded by the French, in 1763 with Quebec and Ontario. Cape Breton forms part of it. See a.
convention between land and Turkey, in this colony was put under British government as long as Batou and may be kept by sia.		British Columbia	do	Settlement of 1866. See a.
ered over the Maltese Javanese pirates in 8. Ceded by the Sultan of Brunei in 1877. See a.		Manitoba.....	do	Detached from the North West Territories in 1870. See a.
d by the Sultan of ruco, in 1346. See a.		North West Territories	do	Settlement ceded by England to the Hudson Bay Co., in 1763. and bought by Canada in 1871. See a.
d by the Sultan of ruco, in 1842.		Newfoundland....	do	Ceded by France in 1713 : 'treaty of Utrecht. English law introduced by 5 Geo. IV, ch. 67.
ular Court established 1865.	<i>British Guiana</i> ...	Demerara.....	Roman-Dutch	Conquered over the Dutch in 1803. Ceded by treaty in 1814. See a, d.
ular Court.		Essequibo.....	do	do do
		Berbice.....	do	do do
		Bermuda ..	English.....	Settlement of 1609. See a.
	<i>British Possessions in West India</i>	British Honduras.	do	Conquered over the Spanish in 1798. English law introduced by Proclamation.
quered in 1759, ceded by France in 1763 : treaty of Paris. A Civil code came into force the 1st August 1866. The previous laws are not abolished. The code is very nearly similar in principle to the code Napoleon. See c.		Bahamas or Key's Islands (<i>Lucayes</i>)	do	Settlement of 1629. Conquered by Spanish in 1781. Bought from them in 1783. See a.

1 In the reports of legal cases, this town is sometimes given as being the colony from which the appeal came.

Borneo, Labuan and company.

COUNTRIES.	COLONIES.	LAW.	REMARKS.
AMERICA.			
<i>British Possessions in West India</i>	Jamaica.....	English.....	Conquered over the Spaniards in 1655. English law introduced by 1 Geo. II, ch. 1, § 17, s. 22.
<i>Leeward Islands</i>	Antigua.....	do	Settlement of 1632. <i>See a.</i>
	Barbuda.....	do	Settlement of 1609. <i>See a.</i>
	Montserrat	do	Settlement of 1628. <i>See a.</i>
	St. Christopher...	do	Owned in common by England and France since 1627. Ceded by France, in 1713: treaty of Utrecht.
	Nevis.....	do	Settlement of 1628. <i>See a.</i>
	Anguilla.....	do	Settlement of 1666. <i>See a.</i>
	Dominica	do	Ceded by France, in 1763. <i>See a.</i>
	The Virgin Islands...	do	Settlement of 1655. <i>See a.</i>
<i>Windward Islands</i>	Grenada	do	Captured by French, in 1779. Restored to England, in 1783. Grenada Act, No 26, in 1874, declared the English law previous to 1729 to be the common law.
	St. Lucia.....	French (<i>Custom of Paris</i>)	Conquered over the French, in 1803. Ceded by treaty of 1814. <i>See c.</i>
	St. Vincent.....	English	Ceded by France, in 1763. Proclamation of 7th October 1763 introduced the English law.
	Barbados	do	Settlement of 1605. <i>See a.</i>
	Tobago.....	do	Ceded to France, in 1802, by the treaty of Amiens, retaining the law of England previous to 1802. Restored to England in 1803.

REMARKS.

COUNTRIES.	COLONIES.	LAW.	REMARKS.
AMERICA.			
<i>Windward Islands.....</i>	Trinidad.....	Spanish	Conquered in 1707 over the Spanish who retained their law. <i>See a.</i>
AFRICA.			
<i>South Africa.....</i>	Cape of Good Hope.....	Roman-Dutch	Conquered, in 1795, over the Dutch. Ceded by treaty of 1815. The law of Holland remained in force. <i>See a, d.</i>
	Griqualand West.	do do	Annexed to the British Empire, in 1871. <i>See a.</i>
	Basutoland.....	Roman-Dutch and native	Annexed to the Cape colony, in 1871, after a war with the natives. Became a separate colony, in 1880.
	Bechuanaland.....	do do	Conquered over the natives, in 1864. Became a separate colony, in 1885.
	Natal.....	do do	Conquered over the Dutch, in 1844. <i>See a, d.</i>
	Zululand	English and Native.....	Part of this kingdom is under British Protectorate since the war of 1879.
<i>West Africa.....</i>	Gambia	English.....	Settlement of 1681. <i>See a</i>
	Gold Coast	English and Native	Settlement of 1872. <i>See a.</i>
	Sierra Leone.....	do do	Settlement of 1787. Ruled under a Charter of Justice of 1825.
	Lagos.	do do	Ceded by the negroes in 1861. Annexed to the Gold Coast in 1876. <i>See a.</i>
	Mauritius.. ..	French (<i>Code Napoléon</i>)	Conquered over the French, in 1810. Ceded by the treaty of 1814. <i>See a, c.</i>

COUNTRIES.	COLONIES.	LAW.	REMARKS.
AFRICA.			
<i>British Possessions in Southern Atlantic...</i>	Ascension	English.	Annexed to the British Empire in 1815. Occupied as naval post. <i>See a.</i>
	Tristan d'Acunha (Island of)	do	Settlement of 1816. <i>See a.</i>
	Falkland Islands.	do	Settlement of 1833. <i>See a.</i>
	St. Helena.	Roman-Dutch	Conquered over the Dutch in 1651. <i>See a, d.</i>
AUSTRALASIA ..			
	New South Wales	English	Settlement of 1787. <i>See a.</i>
	Victoria	do	Separated from New South Wales, in 1851. <i>See a.</i>
	Queensland	do	Separated from New South Wales, in 1859. <i>See a.</i>
	British New Guinea	English and Roman-Dutch	Annexed to the British Empire, in 1884. <i>See a.</i>
	Western Pacific..	English and Native	Group of islands in the Pacific Ocean, under the jurisdiction of a High Commissioner since 1872. <i>See a.</i>
	South Australia...	do	Settlement of 1836. <i>See a.</i>
	Western Australia	do	Settlement of 1829. <i>See a.</i>
	New Zealand.....	do	Purchased from the Natives in 1840. <i>See a.</i>
	Fiji Islands	do	Ceded by the Natives in 1874. <i>See a.</i>
	Van Diemen's Land or Tasmania Island...	do	Settlement of 1804. <i>See a.</i>

APPENDIX "B"

DECISIONS RENDERED BY THE COURT OF QUEEN'S BENCH
(APPEAL SIDE), UNDER THE CODE OF CIVIL PROCEDURE OF THE PROVINCE OF QUEBEC, ON APPEALS TO
HER MAJESTY.

ART. 1178. An appeal lies to Her Majesty in her Privy Council from final judgments rendered in appeal or error by the court of Queen's Bench :

1. In all cases where the matter in dispute relates to any fee of office, duty, rents, revenue, or any sum of money payable to Her Majesty;
2. In cases concerning titles to lands or tenements, annual rents and other matters, by which the rights in future of parties may be affected;
3. In all other cases wherein the matter in dispute exceeds the sum or value of five hundred pounds sterling.

THERE IS NO APPEAL TO THE PRIVY COUNCIL.

1. From a judgment reversing that of the court below which dismissed the action on demurrer. *Simard v. Townsend*, 6 L. C. R. 147 (1856); *Brook v. Bloomfield*, *Ramsay's Appeal Cases*, vo. *Appeal*, p. 55. (1874).
2. From an interlocutory judgment. *Lacroix v. Moreau*, 15 L. C. R. 485 and 16 L. C. R. 180 (1865); *Lambin v. The South Eastern R. R. Co.*, 1 L. N. 55 and 22 L. C. J. 21 (1877). In this last case special leave of appeal was granted by the Privy Council.
3. From a judgment for \$40.00, with *contrainte par corps*. *Pacaud Roy*, 16 L. C. R. 598 (1866).
4. From a judgment granting a new trial, as being a matter of discretion. *Boak v. The Merchant's Marine Insurance Company*, 1 S. C. Reports, 110; *South Eastern Counties Ry Co. v. Lambkin*, *Ramsay's Appeal Cases*, vo. *Appeal*, p. 55 (1877).
5. In matter of *Quo Warranto*. *Pacaud v. Gagné*, 17 L. C. R. 357 (1867).

6. When the amount claimed is under £500 stg., although the action is for overdue instalments of money. *Sauvageau v. Gauthier*, 5 R. L. 102 (1874).

7. In an inscription en faux. *Darling v. Templeton*, 19 L. C. J. 105 (1875).

8. In a matter of *Mandamus*. *Belleville v. Doucet*, 1 Q. L. R. 250 (1875).

9. From a judgment refusing to discharge a person arrested under the warrant of the Speaker of the House of Assembly of Quebec. *Ex-parte Dansereau*. *Ramsay's Appeal Cases*, vo. *Appeal*, p. 55 (1875).

10. In election cases under the Controverted Election Act of Quebec. *Landry v. Thérberge*, 3 Q. L. R. 202 (1876).

11. In the case of a Prohibition where there is no matter in dispute exceeding the sum or value of £500 stg., and where future rights are not bound. The appellant was a practising attorney suspended by the Bar. *O'Farrell v. Brassard*, 1 L. N. 25 and 115; 4 Q. L. R. 214 (1878).

12. From judgments rendered under the Insolvent Act of 1875. *Renny v. Moat*, 2 L. N. 226 and 23 L. C. J. 262 (1879).

13. From a judgment maintaining an action to recover an amount of assessment illegally exacted, the matter in dispute not exceeding £500 stg. The fact that the roll under which the assessment were collected would be in existence for three years more does not bring the case under art. 1178 C. P. C. *Lussier v. Corporation of Hochelaga*, 3 L. N. 309 (1880).

14. From a judgment rejecting an appeal to the Queen's Bench for want of jurisdiction. *Angers, Attorney General v. Murray*, 3 L. N. 308 (1880).

15. On the ground that there was a part of the sum payable to Her Majesty. The case was about the auctioneers tax; and the court held that there was no issue as to its exigibility. *McLeod v. Masham*, 4 L. N. 99 (1881).

THERE IS AN APPEAL TO THE PRIVY COUNCIL.

16. When the amount involved in the controversy exceeds £500 stg., though the amount actually demanded in the declaration be less than £500 stg. *Bunting v. Hibbard*, 1 L. C. L. J. 60 (1865).

17. From a judgment dismissing an attachment before judgment. *Dallimore v. Brooke*, *Ramsay's Appeal Cases*, vo. *Appeal* p. 54 (1874).

18. From a judgment on an action to set aside a Crown Patent, establishing respondent's title to lands. *Pacaud v. Rickaby*, *Ramsay's Appeal Cases* vo. *Appeal* p. 54 (1875).

19. Where there is a cross-demand, if it is so connected with the original demand so as to form part with it, and that both together exceeds £500 stg. *Bartley v. Bartley, Ramsay's Appeal Cases*, Vo. Appeal p. 56 (1877).

20. From a judgment on an injunction to restrain the Government from interfering with the possession of a railroad. *Joly v. Macdonald*, 2 L. N. 104, (1879).

21. From a judgment rejecting a petition to quash a capias. *Golding v. Hochelaga Bank*, 2 L. N. 232, (1879). Leave to appeal was granted by the court of Queen's Bench with great doubts and at the risk of the appellant. The Judicial Committee, in England, afterwards dismissed the appeal on the ground that there was no appeal in such case.

22. From a judgment dissolving an injunction where the matter in dispute exceeds £500 stg. *Dobie v. Board of Temporalities*, etc., 3 L. N. 308 (1880).

23. Interest cannot be added to the capital demanded in the declaration to make up the appealable value. *The Quebec Fire Insurance Co. v. Anderson*, 7 L. C. J. 150 (1860). On special application, leave of appeal was granted by the Privy Council, but errors of calculation having subsequently shown that the amount was still under the appealable value, the leave granted was discharged.

24. A similar application was refused by the court of Queen's Bench, but was allowed by the Privy Council on special petition. *Richer v. Voyer et al.*, 2 R. L. 244, (1870).

25. Same decision of the court of Queen's Bench. *Pacaud v. Queen's Insurance Co.*, II *Stephen's Digest*, vo. Appeal, p. 70 (1876).

26. Same decision of the court of Queen's Bench. *Stanton v. Home Insurance Co.*, II L. N. p. 314 (1879). See remarks of the judges in this cause. See also notes on this question in II L. N., p. 313.

27. The right of appeal upon the opposition made by a defendant to the execution of a judgment, is settled by the nature of the original demand, and not by the matters set forth in the opposition. *Gugy v. Brown*, L. C. R. 273 (1851).

28. An application was made on the last day of the term for leave of appeal to the Privy Council, from a judgment rendered five days previously, but leave was refused, the motion came too late. *Mullin v. Archambault* 3 L. C. L. J. 117 (1867).

29. A party, joint appellant with others, has a right to disavow and refuse to participate in a proceeding to appeal to Her Majesty. *Muir et al. v. Muir*, 15 L. C. J. 79 (1871).

30. Where leave to appeal had been granted, the court of Queen's

Bench has no power to grant an application asking that a portion of the record said to be immaterial be omitted from the transcript. *Lemoine v. Lionais*, 16 L. C. J. 99 (1872).

31. On motion, and by consent of both parties, an *acte argué de faux* may be ordered to be sent to the Privy Council. *Panet v. Hamel*, (1875), *Ramsay's Appeal Cases*, vo. *Appeal* p. 57.

32. Leave of appeal to the Privy Council will be granted although the opposite party has already obtained leave to appeal to the Supreme Court. *City of Montreal v. Devlin*, 1 L. N. 151, and 22 L. C. J. 136 (1878).

33. No motion for leave to appeal to the Privy Council was presented to the court of Queen's Bench when the judgment was rendered, and by error a motion for distraction of costs had been made, a subsequent petition having been presented in chamber for such leave to appeal, the Chief Justice Dorion, the right of appeal being undoubted, allowed the petitioner to give the usual security. *Brewster v. Lamb* III L. N. 75 (1880).

ART. 1178a. (*C. S. P. Q. art. 6009, based on 37 Vict., Quebec, ch. 6, 1874.*) Causes adjudicated upon in review, which are susceptible of appeal to Her Majesty in Her Privy Council, but the appeal whereof to the court of Queen's Bench is taken away by articles 1115a and 1142a, may nevertheless be appealed to Her Majesty by observing the same formalities and provisions and subject to the same conditions, as in the case of judgments rendered by the court of Queen's Bench (appeal side), and with the same effect, as if every provision of law, in relation to appeals to Her Majesty from judgments of the court of Queen's Bench, was enacted in this article with respect to the Superior court sitting in review, its judges, its officers or their office.

1. Where the appeal to the Privy Council is from the court of Review, the security must be entered in the Superior Court and not in the court of Queen's Bench (appeal side). *Young v. The Dental Association*, II L. N. 294 (1879).

ART. 1179. Nevertheless, the execution of a judgment of the court of Queen's Bench cannot be prevented or stayed, unless the party aggrieved gives good and sufficient sureties, within the delay fixed by the court, that he will effectually prosecute the appeal, satisfy the condemnation, and pay such costs and damages as may be awarded by Her Majesty. in the event of the judgment being confirmed.

The security may be received before one of the judges of the court of Queen's Bench.

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The sureties justify their solvency upon the real estate which is described in the bail bond.

One surety suffices, if he is the owner of real estate which he describes, provided that the value of such real estate is equal to the amount of the security, over and above all charges and hypothecs.

The judge who receives such security may order, either on demand or otherwise, the production of the registrar's certificate, the valuation rolls and any other documents for the purposes of the security, and is bound to put such questions as he deems advisable to the sureties, and such questions and the answers thereto may be taken down in writing.

The party appellant may, however, exempt himself from furnishing such security, by depositing an amount equal to that required for the security, either in money, in bonds of the Dominion, or of the Province of Quebec, or in corporation debentures, and such moneys, bonds or debentures are deposited either with the clerk of the court of Queen's Bench, or with the sheriff, as the judge may direct.

1. The amount of security may be increased on causes shewn. *Boswell v. Kilborn et al.*, 7 L. C. J. 150, and 12 L. C. R. 161 (1860).

2. The respondent served a notice that security would be put in on the 18th, but made default. Another notice was given for the Monday following, in the judges' chambers, in the court House. Security was put on that day, but in the judge's house, one the parties signed the bond in the forenoon and the other in the afternoon. On motion to set aside, the court maintained the bond, but the parties were allowed to make such objections to the sufficiency of the security as they might legally have made when it was put in. *Gibb et al. v. The Beacon Fire and Life Assurance Co.*, 10 L. C. R. 402 (1860).

3. After an appeal has been allowed to the Privy Council, the court cannot set aside the bail bond for alleged irregularities, and dismiss the appeal. *Painchand et al. v. Hudon et al.*, L. C. J. 112 (1870).

4. Where an appeal to the Privy Council has been granted and security given, but that one of the security becomes insolvent and the other has left the province, the court of Queen's Bench may order new security to be given, but cannot dismiss the appeal if new security is not put in. *Johnson v. Connolly*, 16 L. C. J. 100 (1871).

5. The attachment of municipal debentures, deposited as security for the costs of appeal, would not prevent the court from accepting it as such security. *Jetté et al., v. McNaughton*, 21 L. C. J. 192 (1876).

6. A judge of the court of Queen's Bench has powers in chambers to extend the delay for giving security, provided this delay is not expired, and to stay the execution of the judgment appealed from. *The Mayor, etc., of Montreal v. Hubert et al.*, 21 L. C. J. 85 (1877).

7. When a deposit has been made as security on an appeal to the Privy Council, and the judgment appealed from is confirmed, but without costs in that court, the deposit will nevertheless avail to liquidate the costs in the court below, and it cannot, therefore, be withdrawn by the appellant. *Lemoine v. Lionais*, 22 L. C. J. 23 (1877).

8. When the appeal is from the court of Review to the Privy Council, the judges of the court of Queen's Bench have no jurisdiction to accept the security, it must be entered in the Superior court. *Young v. The Dental Association*, 11 L. N. 294 (1879).

9. Where appellant neglected to apply for leave to appeal to the Privy Council during the same term, his lawyer being absent when judgment was rendered, but was allowed to put in security during fifteen days after judgment, the record will not be remitted to the court below for execution on the respondent's motion. *Brewster v. Lamb*, 3 L. N. 75 and 109 (1880).

10. Certain rents were declared, by the court of Appeal, insaisissables as "*aliments*," the party succeeding made application for as order to execute the judgment provisionally, but was refused an permission to appeal to the Privy Council had been granted. *Molson v. Carter*, 7 L. N. 292 and 28 L. C. J. 103 (1883).

11. A bond given as security for debt, interest and costs, on appeal by a defendant from the Superior court to the court of Queen's Bench to the effect that the bond will pay the condemnation money in case the judgment be confirmed, is binding, though the judgment of the Queen's Bench reversed the judgment of the court below, if the original judgment of the Superior court has been restored by the Privy Council, and the effect is the same as if the judgment of the Superior court had been affirmed by the court of Queen's Bench. *Lowrey et al v. Routh*, L. R. III Q. B. 364 (1887).

ART. 1180. The appellant may also consent to the judgment being executed, and in such case may give security only for the costs in appeal, under the same conditions as under article 1124.

1. When security is given for costs only, the court will not allow the record to be remitted to the court below in order to enforce execution of the judgment. *Painchaud & al v. Hudon & al*, 15 L. C. J., 112 (1870).

2. Security for costs only having been given, under this article for an appeal to the Privy Council, by depositing a City of Montreal

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debenture, the respondent in execution of his judgment seized it in the hands of the clerk of the court. Held, that notwithstanding the seizure, the security as given was valid and sufficient. *Jetté & al v. McNaughton* 21 *L. C. J.* 192, *Q. B.* (1876).

ART. 1181. The execution of any judgment of the court of Queen's Bench cannot be prevented or stayed after six months from the day on which the appeal was allowed, unless the appellant files in the office of the clerk of appeals, a certificate signed by the clerk of Her Majesty's Privy Council, or any other competent officer, and stating that the appeal has been lodged within such delay and that proceeding have been had therein.

1. When a record had been remitted to the court below in consequence of the certificate not being lodged, the court could not order the prothonotary of the court below to return the record. *Brewster & al v. Chapman & al*, 20 *L. C. J.* 295 (1856).

2. The delay of six months mentioned in article 1181 C. P. C. is not absolute but directory only, leaving a certain discretion to the court of Queen's Bench. *Jones v. Guyon* 2 *L. C. L. J.* 161 (1866).

3. Where leave of appeal was granted, and copy of the record was transmitted within the delay, but the certificate required by article 1181 C. P. C. was not lodged within the delay, the court of Queen's Bench would not order the provisional execution of the judgment appealed from. *Jones v. Guyon* 17 *L. C. R.* 377, (1867).

4. Where appeal had been granted to the Privy Council, and a certificate was filed setting forth that the case is pending before the Judicial Committee, no application in the case could be entertained before the court of Queen's Bench. *Brown v the Mayor, etc., of Montreal*, 19 *L. C. J.* 140, (1875).

5. Where appeal was had to the Privy Council, and the respondent moved to declare the appeal deserted on the ground that the record had not been transmitted, the motion was rejected as a certificate of appeal to the Privy Council was before the court. *Whyte v. Home Insurance Co.*, 19 *L. C. J.* 196, (1875).

6. The only penalty which the failure to proceed on appeal to Her Majesty for more than six months after security has been given can entail, is the execution of the judgment appealed from. *Merchant's Bank of Canada v. Whitfield* 27 *L. C. J.* 183 (1883).

7. When the appeal to the Privy Council has not been lodged within the six months following the leave of appeal, the record may be transmitted to the Superior court for execution. *Allan & al v. Pratt III J. R.*, *Q. B.* (1887).

ART. 1182. The clerk of appeals of the court of Queen's Bench is bound to register any exemplification of a decree of Her Majesty in Her Privy Council, as soon as it is presented to him for that purpose, without requiring any order of the court of Queen's Bench to that effect, and to send back the record in the case to the court below, together with a copy of such exemplification which has been registered as above mentioned.

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APPENDIX C.

DOUBLE ALPHABETICAL TABLE OF CASES¹

A

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